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General Provisions

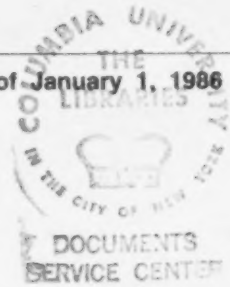
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code of federal regulations

General Provisions

1

Revised as of January 1, 1986

2

(Reserved)

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JANUARY 1, 1986

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records
Administration

as a Special Edition of
the Federal Register



General Provision

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General Provision

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U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1986

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Cite this Code CFR

thus: 1 CFR 1.1

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....	as of January 1
Title 17 through Title 27.....	as of April 1
Title 28 through Title 41.....	as of July 1
Title 42 through Title 50.....	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

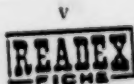
HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, January 1, 1986), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

EFFECTIVE AND EXPIRATION DATES

Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a



date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled **CFR INDEX AND FINDING AIDS**. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

REPUBLICATION OF MATERIAL

There are no restrictions on the republication of material appearing in the Code of Federal Regulations.

INQUIRIES AND SALES

For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 (telephone 202-783-3238).

JOHN E. BYRNE,

Director,

Office of the Federal Register.

January 2, 1986

THIS TITLE

Title 1—**GENERAL PROVISIONS** is composed of one volume. The contents of this volume represent all current regulations issued by the Administrative Committee of the Federal Register, the Office of the Federal Register, and the Administrative Conference of the United States, as of January 1, 1986. In addition, Chapter IV contains the current Privacy Act, Freedom of Information Act, and Government in the Sunshine Act regulations issued by miscellaneous agencies.

An Index to Chapter I appears in the Finding Aids section of this volume.

For this volume Doris M. O'Keefe was Chief Editor. The Code of Federal Regulations publication program is under the direction of Martha B. Girard, assisted by Robert E. Jordan.

Would you like to know...

if any changes have been made to the Code of Federal Regulations or what documents have been published in the Federal Register without reading the Federal Register every day? If so, you may wish to subscribe to the *LSA (List of CFR Sections Affected)*, the *Federal Register Index*, or both.

LSA - List of CFR Sections Affected

The LSA (List of CFR Sections Affected) is designed to lead users of the Code of Federal Regulations to amendatory actions published in the Federal Register. The LSA is issued monthly in cumulative form. Entries indicate the nature of the changes—such as revised, removed, or corrected.

\$24 00 per year

Federal Register Index

The Index, covering the contents of the daily Federal Register, is issued monthly in cumulative form. Entries are carried primarily under the names of the issuing agencies. Significant subjects are carried as cross-references.

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A testing ad is included in each publication which lists Federal Register page numbers with the date of publication in the Federal Register.

Note to FR Subscribers:
FR indexes and the LSA (List of CFR Sections Affected) are mailed automatically to regular FR subscribers.



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CHAPTER I—ADMINISTRATIVE COMMITTEE OF THE FEDERAL REGISTER

EDITORIAL NOTE: An Index to Chapter I appears in the Finding Aids section of this volume.

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SUBCHAPTER A—GENERAL

PART 1—DEFINITIONS

§ 1.1 Definitions.

As used in this chapter, unless the context requires otherwise—

“Administrative Committee” means the Administrative Committee of the Federal Register established under section 1506 of Title 44, United States Code;

“Agency” means each authority, whether or not within or subject to review by another agency, of the United States, other than the Congress, the courts, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

“Document” includes any Presidential proclamation or Executive order, and any rule, regulation, order, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by an agency;

“Document having general applicability and legal effect” means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations; and

“Filing” means making a document available for public inspection at the Office of the Federal Register during official business hours. A document is filed only after it has been received, processed and assigned a publication date according to the schedule in Part 17 of this chapter.

“Regulation” and “rule” have the same meaning.

(44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189)

[37 FR 23603, Nov. 4, 1972, as amended at 50 FR 12466, Mar. 28, 1985]

PART 2—GENERAL INFORMATION

Sec.

2.1 Scope and purpose.

2.2 Administrative Committee of the Federal Register.

2.3 Office of the Federal Register; location; office hours.

2.4 General authority of Director.

2.5 Publication of statutes, regulations, and related documents.

2.6 Unrestricted use.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189; 1 U.S.C. 112; 1 U.S.C. 113.

SOURCE: 37 FR 23603, Nov. 4, 1972, unless otherwise noted.

§ 2.1 Scope and purpose.

(a) This chapter sets forth the policies, procedures, and delegations under which the Administrative Committee of the Federal Register carries out its general responsibilities under Chapter 15 of Title 44, United States Code.

(b) A primary purpose of this chapter is to inform the public of the nature and uses of Federal Register publications.

§ 2.2 Administrative Committee of the Federal Register.

(a) The Administrative Committee of the Federal Register is established by section 1506 of Title 44, United States Code.

(b) The Committee consists of—

(1) The Archivist, or Acting Archivist, of the United States, who is the Chairman;

(2) An officer of the Department of Justice designated by the Attorney General; and

(3) The Public Printer or Acting Public Printer.

(c) The Director of the Federal Register is the Secretary of the Committee.

(d) Any material required by law to be filed with the Committee, and any correspondence, inquiries, or other material intended for the Committee or which relate to Federal Register publications shall be sent to the Director of the Federal Register.

Admin. Comm. of the Federal Register

§ 3.2

§ 2.3 Office of the Federal Register; location; office hours.

(a) The Office of the Federal Register is a component of the National Archives and Records Service of the General Services Administration.

(b) The Office is located at 1100 L Street NW., Washington, D.C.

(c) The mailing address is: Office of the Federal Register, National Archives and Records Service, Washington, D.C. 20408.

(d) Office hours are 8:45 a.m. to 5:15 p.m., Monday through Friday, except for official Federal holidays.

§ 2.4 General authority of Director.

(a) The Director of the Federal Register is delegated authority to administer generally this chapter, the related provisions of Chapter 15 of Title 44, United States Code, and the pertinent provisions of statutes and regulations contemplated by section 1505 of Title 44, United States Code.

(b) The Director may return to the issuing agency any document submitted for publication in the **FEDERAL REGISTER**, or a special edition thereof, if in his judgment the document does not meet the minimum requirements of this chapter.

§ 2.5 Publication of statutes, regulations, and related documents.

(a) The Director of the Federal Register is responsible for the central filing of the original acts enacted by Congress and the original documents containing Executive orders and proclamations of the President, other Presidential documents, regulations, and notices of proposed rulemaking and other notices, submitted to the Director by officials of the executive branch of the Federal Government.

(b) Based on the acts and documents filed under paragraph (a) of this section, the Office of the Federal Register publishes the "slip laws," the "United States Statutes at Large," the daily **FEDERAL REGISTER** and the "Code of Federal Regulations."

(c) Based on source materials that are officially related to the acts and documents filed under paragraph (a) of this section, the Office also publishes the "United States Government Organization Manual," the "Public

Papers of the Presidents of the United States," and the "Weekly Compilation of Presidential Documents."

§ 2.6 Unrestricted use.

Any person may reproduce or republish, without restriction, any material appearing in any regular or special edition of the **FEDERAL REGISTER**.

PART 3—SERVICES TO THE PUBLIC

Sec.

3.1 Information services.

3.2 Public inspection of documents.

3.3 Reproductions and certified copies of acts and documents.

3.4 Subscriptions and availability of Federal Register publications.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23604, Nov. 4, 1972, unless otherwise noted.

§ 3.1 Information services.

Except in cases where the time required would be excessive, information concerning the publications described in § 2.5 of this chapter and the original acts and documents filed with the Office of the Federal Register is provided by the staff of that Office. However, the staff may not summarize or interpret substantive text of any act or document.

§ 3.2 Public inspection of documents.

(a) Current documents filed with the Office of the Federal Register pursuant to law are available for public inspection in Room 8401, 1100 L Street NW., Washington, D.C., during the Office of the Federal Register office hours. There are no formal inspection procedures or requirements.

(b) The Director of the Federal Register shall cause each document received by the office to be filed for public inspection not later than the working day preceding the publication day for that document.

(c) The Director shall cause to be placed on the original and certified copies of each document a notation of the day and hour when it was filed and made available for public inspection.

§ 3.3

(d) Manual, typewritten, or other copies of documents or excerpts may be made at the inspection desk.

§ 3.3 Reproductions and certified copies of acts and documents.

The regulations for the public use of records in the National Archives (41 CFR Part 105-61) govern the furnishing of reproductions of acts and documents and certificates of authentication for them. Section 105-61.108 of those regulations provides for the advance payment of appropriate fees for reproduction services and for certifying reproductions.

§ 3.4 Subscriptions and availability of Federal Register publications.

(a) The publications described in § 2.5 of this chapter are published by the Government Printing Office and are sold by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. They are not available for free distribution to the public.

(b) Federal Register publications are available through subscription, as follows:

(1) *Slip laws*. In accordance with section 709 of Title 44, United States Code, printed slip form copies of public and private laws are available from the Superintendent of Documents, individually or by subscription service on a yearly basis.

(2) *U.S. Statutes at Large*. In accordance with section 728 of Title 44, United States Code, copies of the United States Statutes at Large are available from the Superintendent of Documents.

(3) *Federal Register*. The daily issues of the FEDERAL REGISTER will be furnished by mail to subscribers for \$300 per year or \$150 for six months for the paper edition, or for \$145 per year for the microfiche edition. Subscription fees are payable in advance to the Superintendent of Documents, Government Printing Office. Limited quanti-

1 CFR Ch. I (1-1-86 Edition)

ties of current or recent paper and microfiche copies may be obtained from the Superintendent of Documents, Government Printing Office, for \$1.50 per copy.

(4) *Code of Federal Regulations*. A complete set will be furnished by mail to subscribers for \$595 per year for the bound, paper edition, or for \$185 per year for the microfiche edition. Subscription fees are payable in advance to the Superintendent of Documents. Individual copies of the Code volumes are sold by the Superintendent of Documents at prices determined by the Superintendent under the general direction of the Administrative Committee. The price of an individual volume in microfiche is \$3.75.

(5) *U.S. Government Manual*. Placed on sale by the Superintendent of Documents at a price determined by him, under the general direction of the Administrative Committee.

(6) *Public Papers of the Presidents of the United States*. Annual volumes are placed on sale by the Superintendent of Documents at a price determined by him, under the general direction of the Administrative Committee.

(7) *Weekly Compilation of Presidential Documents*—(i) *Nonpriority mailing*. Issues will be furnished by mail to subscribers for \$64 in advance to the Superintendent of Documents, Government Printing Office.

(ii) *First-class mailing*. Issues will be furnished to subscribers by first-class mail for \$105 per year payable in advance to the Superintendent of Documents, Government Printing Office. Individual issues may be obtained for \$1.75 per copy from the Superintendent of Documents, Government Printing Office.

(8) *Federal Register Index*. The annual subscription price for the FEDERAL REGISTER Index purchased separately is \$22.

[37 FR 23604, Nov. 4, 1972, as amended at 49 FR 39511, Oct. 9, 1984; 50 FR 35533, Sept. 3, 1985]

SUBCHAPTER B—THE FEDERAL REGISTER

PART 5—GENERAL

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- 5.1 Publication policy.
- 5.2 Documents required to be filed and published.
- 5.3 Publication of other documents.
- 5.4 Publication not authorized.
- 5.5 Supplement to the Code of Federal Regulations.
- 5.6 Daily publication.
- 5.7 Delivery and mailing.
- 5.8 Form of citation.
- 5.9 Categories of documents.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23604, Nov. 4, 1972, unless otherwise noted.

§ 5.1 Publication policy.

(a) Pursuant to Chapter 15 of Title 44, United States Code, and this chapter, the Director of the Federal Register shall publish a serial publication called the "FEDERAL REGISTER" to contain the following:

(1) Executive orders, proclamations, and other Presidential documents.

(2) Documents required to be published therein by law.

(3) Documents accepted for publication under § 5.3.

(b) Each document required or authorized to be filed for publication shall be published in the **FEDERAL REGISTER** as promptly as possible, within limitations imposed by considerations of accuracy, usability, and reasonable costs.

(c) In prescribing regulations governing headings, preambles, effective dates, authority citations, and similar matters of form, the Administrative Committee does not intend to affect the validity of any document that is filed and published under law.

§ 5.2 Documents required to be filed and published.

The following documents are required to be filed with the Office of the Federal Register and published in the **FEDERAL REGISTER**:

(a) Presidential proclamations and Executive orders in the numbered series, and each other document that

the President submits for publication or orders to be published.

(b) Each document or class of documents required to be published by act of Congress.

(c) Each document having general applicability and legal effect.

§ 5.3 Publication of other documents.

Whenever the Director of the Federal Register considers that publication of a document not covered by § 5.2 would be in the public interest, he may allow that document to be filed with the Office of the Federal Register and published in the **FEDERAL REGISTER**.

§ 5.4 Publication not authorized.

(a) Chapter 15 of Title 44, United States Code, does not apply to treaties, conventions, protocols, or other international agreements, or proclamations thereof by the President.

(b) Chapter 15 of Title 44, United States Code, prohibits the publication in the **FEDERAL REGISTER** of comments or news items.

(c) The Director of the Federal Register may not accept any document for filing and publication unless it is the official action of the agency concerned. Chapter 15 of Title 44, United States Code, does not authorize or require the filing and publication of other papers from an agency.

§ 5.5 Supplement to the Code of Federal Regulations.

The **FEDERAL REGISTER** serves as a daily supplement to the Code of Federal Regulations. Each document that is subject to codification and published in a daily issue shall be keyed to the Code of Federal Regulations.

§ 5.6 Daily publication.

There shall be an edition of the **FEDERAL REGISTER** for each official Federal working day.

§ 5.7 Delivery and mailing.

The Government Printing Office shall distribute the **FEDERAL REGISTER** by delivery or by deposit at a post

§ 5.8

office at or before 9 a.m. on the publication day, except that each **FEDERAL REGISTER** dated for a Monday shall be deposited at a post office at or before 9 a.m. on the preceding Saturday.

§ 5.8 Form of citation.

Without prejudice to any other form of citation, **FEDERAL REGISTER** material may be cited by volume and page number, and the short form "FR" may be used for "FEDERAL REGISTER". For example, "37 FR 6803" refers to material beginning on page 6803 of volume 37 of the daily issues.

§ 5.9 Categories of documents.

Each document published in the **FEDERAL REGISTER** shall be placed under one of the following categories, as indicated:

(a) *The President*. Containing each Executive order or Presidential proclamation, and each other Presidential document that the President submits for publication or orders to be published.

(b) *Rules and Regulations*. Containing each document subject to codification, except those covered by paragraph (a) of this section.

(c) *Proposed rule making*. Containing each notice of proposed rule making submitted pursuant to section 553 of Title 5, United States Code, or any other law, and each notice of a similar nature voluntarily submitted by an issuing agency.

(d) *Notices*. Containing miscellaneous documents not covered by paragraphs (a), (b), or (c) of this section, such as notices of hearings that are not included under proposed rule making documents and documents accepted for publication on the basis of public interest.

PART 6—INDEXES AND ANCILLARIES

Sec.

6.1 Index to daily issues.

6.2 Analytical subject indexes.

6.3 Daily lists of parts affected.

6.4 Monthly list of sections affected.

6.5 Index-digests and guides.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

1 CFR Ch. I (1-1-86 Edition)

SOURCE: 37 FR 23605, Nov. 4, 1972, unless otherwise noted.

§ 6.1 Index to daily issues.

Each daily issue of the **FEDERAL REGISTER** shall be appropriately indexed.

§ 6.2 Analytical subject indexes.

Analytical subject indexes covering the contents of the **FEDERAL REGISTER** shall be published as currently as practicable and shall be cumulated and separately published at least once each calendar year.

§ 6.3 Daily lists of parts affected.

(a) Each daily issue of the **FEDERAL REGISTER** shall carry a numerical list of the parts of the Code of Federal Regulations specifically affected by documents published in that issue.

(b) Beginning with the second issue of each month, each daily issue shall also carry a cumulated list of the parts affected by documents published during that month.

§ 6.4 Monthly list of sections affected.

A monthly list of sections of the Code of Federal Regulations affected shall be separately published on a cumulative basis during each calendar year. The list shall identify the sections of the Code specifically affected by documents published in the **FEDERAL REGISTER** during the period it covers.

§ 6.5 Index-digests and guides.

(a) The Director of the Federal Register may cause to be prepared and published, yearly or at other intervals as necessary to keep them current and useful, index-digests and similar guides, based on laws, Presidential documents, regulations, and notice materials published by the Office and which serve a need of users of the **FEDERAL REGISTER**.

(b) Each digest and guide is considered to be a special edition of the **FEDERAL REGISTER** whenever the public need requires special printing or special binding in substantial numbers.

PART 7—DISTRIBUTION WITHIN FEDERAL GOVERNMENT

Sec.

- 7.1 Official distribution.
- 7.4 Requisitions for quantity overruns of specific issues.
- 7.5 Requisitions for quantity overruns of separate Part issues.
- 7.6 Extra copies.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23605, Nov. 4, 1972, unless otherwise noted.

§ 7.1 Official distribution.

Copies of the daily **FEDERAL REGISTER** in paper and microfiche copies as requested shall be distributed to the following without charge:

(a) *Senators and Representatives.* To each Senator and each Member of the House of Representatives not more than five copies of each daily issue.

(b) *Committees.* To each Committee of the Senate and the House of Representatives in the quantity needed for official use, upon written authorization of the Chairperson, or authorized delegate, to the Director of the Federal Register.

(c) *The Supreme Court.* The Supreme Court is entitled to the number of copies of each daily issue of the **FEDERAL REGISTER** that it needs for official use.

(d) *Other courts.* Each other constitutional or legislative court of the United States is entitled to the number of copies of each daily issue of the **FEDERAL REGISTER** that it needs for official use, based on a written authorization submitted to the Director of the Federal Register by the Director of the Administrative Office of the U.S. Courts specifying the number needed.

(e) *Executive Agencies.* Each Federal executive agency is entitled to the number of copies of each daily issue of the **FEDERAL REGISTER** that it needs for

official use. The person in each agency concerned who is authorized under §§ 16.1 and 16.4 of this chapter to list the officers and employees of that agency who need the **FEDERAL REGISTER** for daily use shall send a written request to the Director of the Federal Register for placement of the names of those officers and employees on the mailing list.

[50 FR 12466, Mar. 28, 1985]

§ 7.4 Requisitions for quantity overruns of specific issues.

(a) To meet its needs for special distribution of the **FEDERAL REGISTER** in substantial quantity, any agency may request an overrun of a specific issue.

(b) An advance printing and binding requisition on Standard Form 1 must be submitted by the agency directly to the Government Printing Office, to be received not later than 12 noon on the working day before publication.

§ 7.5 Requisitions for quantity overruns of separate Part issues.

(a) Whenever it is determined by the Director of the Federal Register to be in the public interest, one or more documents may be published as a separate Part (e.g., Part II, Part III) of the **FEDERAL REGISTER**.

(b) Advance arrangements for this service must be made with the Office of the Federal Register.

(c) Any agency may request an overrun of such a separate Part by submitting an advance printing and binding requisition on Standard Form 1 directly to the Government Printing Office, to be received not later than 12 noon on the working day before the publication date.

§ 7.6 Extra copies.

An agency may order limited quantities of extra copies of a specific issue of the **FEDERAL REGISTER** for official use, from the Superintendent of Documents, to be paid for by that agency.

SUBCHAPTER C—SPECIAL EDITIONS OF THE FEDERAL REGISTER

PART 8—CODE OF FEDERAL REGULATIONS

Sec.

- 8.1 Policy.
- 8.2 Orderly development.
- 8.3 Periodic updating.
- 8.4 Indexes.
- 8.5 Ancillaries.
- 8.6 General format and binding.
- 8.7 Agency cooperation.
- 8.8 Official distribution.
- 8.9 Form of citation.

AUTHORITY: 44 U.S.C. 1506, 1510; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23605, Nov. 4, 1972, unless otherwise noted.

§ 8.1 Policy.

(a) Pursuant to Chapter 15 of Title 44, United States Code, the Director of the Federal Register shall publish periodically a special edition of the FEDERAL REGISTER to present a compact and practical code called the "Code of Federal Regulations", to contain each Federal regulation of general applicability and current or future effect.

(b) The Administrative Committee intends that every practical means be used to keep the Code as current and readily usable as possible, within limitations imposed by dependability and reasonable costs.

§ 8.2 Orderly development.

To assure orderly development of the Code of Federal Regulations along practical lines, the Director of the Federal Register may establish new titles in the Code and rearrange existing titles and subordinate assignments. However, before taking an action under this section, the Director shall consult with each agency directly affected by the proposed change.

§ 8.3 Periodic updating.

(a) *Criteria.* Each book of the Code shall be updated at least once each calendar year, if no change in its contents has occurred during the year, a simple notation to that effect may serve as the supplement for that year.

More frequent updating of any unit of the Code may be made whenever the Director of the Federal Register determines that the content of the unit has been substantially superseded or otherwise determines that such action would be consistent with the intent and purpose of the Administrative Committee as stated in § 8.1.

(b) *Staggered publication.* The Code will be produced over a 12-month period under a staggered publication system to be determined by the Director of the Federal Register.

(c) *Cutoff dates.* Each updated Title of the Code will reflect each amendment to that Title published in the FEDERAL REGISTER on or before the "As of" date. Thus, each Title updated as of July 1 each year will reflect all amendatory documents appearing in the daily FEDERAL REGISTER on or before July 1.

§ 8.4 Indexes.

A subject index to the entire Code shall be annually revised and separately published. An agency-prepared index for any individual book may be published with the approval of the Director of the Federal Register.

§ 8.5 Ancillaries.

The Code shall provide, among others, the following-described finding aids:

(a) *Parallel tables of statutory authority and rules.* In Title 2 of the Code of Federal Regulations or at such other place as the Director of the Federal Register considers appropriate, numerical lists of all sections of the current edition of the United States Code (except section 301 of Title 5) which are cited by issuing agencies as rule making authority for currently effective regulations in the Code of Federal Regulations. The lists shall be arranged in the order of the titles and sections of the United States Code with parallel citations to the pertinent titles and sections of the Code of Federal Regulations.

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(b) *Parallel tables of Presidential documents and agency rules.* In Title 3 of the Code of Federal Regulations, or at such other place as the Director of the Federal Register considers appropriate, tables of proclamations, Executive orders, and similar Presidential documents which are codified, cited as authority, quoted, cited in text, or included or referred to in currently effective regulations as published in the Code of Federal Regulations.

(c) *List of sections affected.* Following the text of each book or cumulative supplement, a numerical list of sections which are affected by documents published in the FEDERAL REGISTER. (Separate volumes, "List of Sections Affected, 1949-1963" and "List of Sections Affected, 1964-1972" list all sections of the Code which have been affected by documents published during the period January 1, 1949 to December 31, 1963 and January 1, 1964 to December 31, 1972 respectively.) Listings shall refer to FEDERAL REGISTER pages and shall be designed to enable the user of the Code to assure the user of the precise text that was in effect on a given date in the period covered.

[37 FR 23605, Nov. 4, 1972, as amended at 50 FR 12466, Mar. 28, 1985]

§ 8.6 General format and binding.

The Director of the Federal Register shall provide for the binding of the Code into as many separate books as are indicated by the needs of users and compatible with the facilities of the Government Printing Office.

§ 8.7 Agency cooperation.

Each agency shall cooperate in keeping publication of the Code current by complying promptly with deadlines set by the Director of the Federal Register and the Public Printer.

§ 8.8 Official distribution.

(a) The Code of Federal Regulations, in paper or microfiche copies as requested, shall be distributed to the following, without charge:

(1) *Congress.* To each committee of the Senate and House of Representatives in the quantity needed for official use, upon the written authorization of the committee chairman or his

delegate, to the Director of the Federal Register.

(2) *Supreme Court.* To the Supreme Court in the quantity needed for official use.

(3) *Other courts.* To other constitutional and legislative courts of the United States, in the quantity needed for official use, upon the written authorization of the Director of the Administrative Office of the U.S. Courts to the Director of the Federal Register.

(4) *Executive agencies.* To officials, libraries, and major organizational units of the executive agencies in the quantity needed for official use up to 300 copies of individual titles per agency, upon the written authorization of the authorizing officer or the alternate designated under § 16.1 of this chapter.

(b) *Legislative, judicial, and executive agencies of the Federal Government* may obtain selected units of the Code, as needed in substantial quantity for special distribution, by the timely submission of a printing and binding requisition to the Government Printing Office on Standard Form 1.

[37 FR 23605, Nov. 4, 1972, as amended at 50 FR 12467, Mar. 28, 1985]

§ 8.9 Form of citation.

The Code of Federal Regulations may be cited by title and section, and the short form "CFR" may be used for "Code of Federal Regulations." For example, "1 CFR 10.2" refers to Title 1, Code of Federal Regulations, Part 10, section 2.

PART 9—UNITED STATES GOVERNMENT MANUAL

Sec.

9.1 Publication required.

9.2 Scope.

9.3 Distribution to Government agencies.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23606, Nov. 4, 1972, unless otherwise noted.

§ 9.1 Publication required.

The Director of the Federal Register shall separately publish annually or at

§ 9.2

times designated by the Administrative Committee of the Federal Register a special edition of the **FEDERAL REGISTER** called the "United States Government Manual" or any other title that the Administrative Committee of the Federal Register considers appropriate. The Director of the Federal Register may issue special supplements to the Manual when he considers such supplementation to be in the public interest.

[37 FR 23606, Nov. 4, 1972, as amended at 50 FR 12467, Mar. 28, 1985]

§ 9.2 Scope.

(a) The Manual shall contain appropriate information about the Executive, Legislative, and Judicial branches of the Federal Government, which for the major Executive agencies shall include—

(1) Descriptions of the agency's public purposes, programs and functions;

(2) Established places and methods whereby the public may obtain information and make submittals or requests; and

(3) Lists of officials heading major operating units.

(b) Brief information about quasiofficial agencies and supplemental information that in the opinion of the Director of the Federal Register is of enough public interest to warrant inclusion shall also be published in the Manual.

§ 9.3 Distribution to Government agencies.

(a) The United States Government Manual shall be distributed to the following, in the quantities indicated, without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives shall be furnished twelve copies.

(2) *Congressional Committees.* Each committee is entitled to the quantity needed for official use, upon the written request of the chairman of the committee, or his delegate, to the Director, for placement on the mailing list.

(3) *Supreme Court.* The Supreme Court is entitled to 18 copies.

(4) *Other courts.* Each other constitutional or legislative court is entitled

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to one copy, upon the written authorization of the Director of the Administrative Office of the U.S. Courts to the Director of the Federal Register.

(5) *Executive agencies.* The head of each executive agency and each liaison officer designated under § 16.1 or § 20.1 of this chapter is entitled to one copy.

(b) Legislative, judicial, and executive agencies of the Federal Government may obtain additional copies of the Manual, at costs, for official use by submission, before the press run, of a printing and binding requisition to the Government Printing Office on Standard Form 1. After the press run, each request for extra copies of the Manual must be addressed to the Superintendent of Documents, to be paid for by the agency or official making the request.

[37 FR 23606, Nov. 4, 1972, as amended at 50 FR 12467, Mar. 28, 1985]

PART 10—PRESIDENTIAL PAPERS

Subpart A—Weekly Publication

Sec.

10.1 Publication required.

10.2 Scope and sources.

10.3 Format, indexes, and ancillaries.

10.4 Distribution to Government agencies.

Subpart B—Annual Publication

10.10 Publication required.

10.11 Scope and sources.

10.12 Format, indexes, and ancillaries.

10.13 Coverage of prior years.

10.14 Distribution to Government agencies.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 50 FR 12467, Mar. 28, 1985, unless otherwise noted.

Subpart A—Weekly Publication

§ 10.1 Publication required.

The Director of the Federal Register shall publish a special edition of the **FEDERAL REGISTER** called the "Weekly Compilation of Presidential Documents".

§ 10.2 Scope and sources.

(a) The basic text of each publication consists of oral statements by the

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President or of writing subscribed by the President, and selected from transcripts or text issued by the Office of the White House Press Secretary, including—

- (1) Communications to Congress;
- (2) Public addresses and remarks;
- (3) News conferences and interviews;
- (4) Public messages and letters;
- (5) Statements released on miscellaneous subjects; and
- (6) Formal executive documents promulgated in accordance with law.

(b) In addition, each publication includes selections, either in full text or ancillary form, from the following groups of documents, when issued by the Press Office.

- (1) Announcements of Presidential appointments and nominations;
- (2) White House statements and announcements on miscellaneous subjects;
- (3) Statements by the Press Secretary or Deputy Press Secretary;
- (4) Statements and news conferences by senior administration officials; and
- (5) Fact sheets.

§ 10.3 Format, indexes, and ancillaries.

(a) The "Weekly Compilation of Presidential Documents" is published in the binding and style that the Administrative Committee of the Federal Register considers suitable for public and official use.

(b) Each publication is appropriately indexed and contains ancillary information respecting Presidential activities and documents not printed in full text. In general, ancillary texts, notes, and tables are derived from official sources.

§ 10.4 Distribution to Government agencies.

(a) The "Weekly Compilation of Presidential Documents" is distributed regularly to Members of the Senate and the House of Representatives and to officials of the legislative, judicial, and executive branches of the Federal Government without charge in the quantities needed for official use. Requests for copies shall be made in writing by the authorizing officer to the Director of the Federal Register.

(b) Special needs for selected issues in substantial quantity are filled by

the timely submission of a printing and binding requisition to the Government Printing Office on Standard Form 1.

Subpart B—Annual Publication

§ 10.10 Publication required.

The Director of the Federal Register shall publish annually a special edition of the **FEDERAL REGISTER** called the "Public Papers of the Presidents of the United States".

§ 10.11 Scope and sources.

The basic text of the Public Papers consists of the documents printed in the "Weekly Compilation of Presidential Documents".

§ 10.12 Format, indexes, and ancillaries.

(a) Each publication covers one calendar year, unless procedures require otherwise, and is divided into books according to the amount of material to be included. The publication is published in the binding and style that the Administrative Committee of the Federal Register considers suitable to the dignity of the Office of the President of the United States.

(b) Each publication is appropriately indexed and contains additional ancillary information and illustrative material respecting significant Presidential documents and activities.

§ 10.13 Coverage of prior years.

The Administrative Committee may authorize the publication of volumes of papers of the Presidents covering specified years before 1945 after consulting with the National Historical Publications and Records Commission.

§ 10.14 Distribution to Government agencies.

(a) The Public Papers are distributed to the following, in the quantities indicated, without charge:

(1) *Members of Congress.* Each Senator and each Member of the House of Representatives is entitled to one copy of each annual publication published during the Member's term in office, upon the Member's written request to the Director of the Federal Register.

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(2) *Supreme Court.* The Supreme Court is entitled to 12 copies of each publication.

(3) *Executive agencies.* The head of each executive agency is entitled to one copy of each publication upon application to the Director of the Federal Register.

(b) Legislative, judicial, and executive agencies of the Federal Govern-

ment may obtain copies of the publication, at cost, for official use, by the timely submission of a printing and binding requisition to the Government Printing Office on Standard Form 1.

(c) Each request for extra copies of the publication must be addressed to the Superintendent of Documents, to be paid for by the agency or official making the request.

SUBCHAPTER D—PREPARATION, TRANSMITTAL, AND PROCESSING OF DOCUMENTS

PART 15—SERVICES TO FEDERAL AGENCIES

Subpart A—General

Sec.

- 15.1 Cooperation.
- 15.2 Information services.
- 15.3 Staff assistance.
- 15.4 Reproduction of certified copies of acts and documents.
- 15.5 Official subscriptions and requisitions of Federal Register publications.

Subpart B—Special Assistance

§ 15.10 Information on drafting and publication.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23607, Nov. 4, 1972, unless otherwise noted.

Subpart A—General

§ 15.1 Cooperation.

The Director of the Federal Register shall assist each agency in complying with the pertinent publication laws to assure efficient public service in promulgating administrative documents having the effect of legal notice or of law.

§ 15.2 Information services.

The Director of the Federal Register shall provide for the answering of each appropriate inquiry presented in person, by telephone, or in writing. Each written communication and each matter involving the Administrative Committee shall be sent to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408.

[50 FR 12468, Mar. 28, 1985]

§ 15.3 Staff assistance.

The staff of the Office of the Federal Register shall provide informal assistance and advice to officials of the various agencies with respect to general or specific programs of regulatory

drafting, procedures, and promulgation practices.

§ 15.4 Reproduction of certified copies of acts and documents.

The Director of the Federal Register shall furnish to requesting agencies, at cost, reproductions or certified copies of original acts and documents filed with that Office that are needed for official use unless funds are appropriated for that purpose.

[50 FR 12468, Mar. 28, 1985]

§ 15.5 Official subscriptions and requisitions of Federal Register publications.

The following governs the availability of Federal Register publications for official use.

(a) *Slip laws.* Single copies may be obtained from the House or Senate Document Room, U.S. Congress. Quantity overruns of any slip law may be obtained by the timely submission of a requisition to the Government Printing Office on Standard Form 1.

(b) *U.S. Statutes at Large.* Written requests should be directed to the Joint Committee on Printing, United States Capitol, Washington, D.C. 20510. General provisions relating to the distribution of the U.S. Statutes at Large are set forth in section 728 of Title 44, United States Code.

(c) *Federal Register.* See §§ 7.1 to 7.6 of this chapter.

(d) *Code of Federal Regulations.* See § 8.8 of this chapter.

(e) *U.S. Government Organization Manual.* See § 9.3 of this chapter.

(f) *Public Papers of the Presidents of the United States.* See §§ 10.5 and 10.6 of this chapter.

(g) *Weekly Compilation of Presidential Documents.* See § 10.12 of this chapter.

Subpart B—Special Assistance

§ 15.10 Information on drafting and publication.

The Director of the Federal Register may prepare, and distribute to agen-

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cies, information and instructions designed to promote effective compliance with the purposes of Chapter 15 of Title 44, United States Code, sections 552-553 of Title 5, United States Code, related statutes, and this chapter. The Director may also develop and conduct programs of technical instruction.

PART 16—AGENCY REPRESENTATIVES

Sec.

- 16.1 Designation.
- 16.2 Liaison duties.
- 16.3 Certifying duties.
- 16.4 Authorizing duties.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23608, Nov. 4, 1972, unless otherwise noted.

§ 16.1 Designation.

(a) Each agency shall designate, from its officers or employees, persons to serve in the following capacities with relation to the Office of the Federal Register:

- (1) A liaison officer and an alternate.
- (2) A certifying officer and an alternate.
- (3) An authorizing officer and an alternate.

The same person may be designated to serve in one or more of these positions.

(b) In choosing its liaison officer, each agency should consider that this officer will be the main contact between that agency and the Office of the Federal Register and that the liaison officer will be charged with the duties set forth in § 16.2. Therefore, the agency should choose a person who is directly involved in the agency's regulatory program.

(c) Each agency shall notify the Director of the name, title, address, and telephone number of each person it designates under this section and shall promptly notify the Director of any changes.

§ 16.2 Liaison duties.

Each liaison officer shall—

- (a) Represent his agency in all matters relating to the submission of doc-

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uments to the Office of the Federal Register, and respecting general compliance with this chapter;

(b) Be responsible for the effective distribution and use within his agency of FEDERAL REGISTER information on document drafting and publication assistance authorized by § 15.10 of this chapter; and

(c) Promote his agency's participation in the technical instruction authorized by § 15.10 of this chapter.

§ 16.3 Certifying duties.

The certifying officer is responsible for furnishing, to the Director of true copies of each original document submitted by his agency to the Office of the Federal Register and for making the certification required by §§ 18.5 and 18.6 of this chapter.

§ 16.4 Authorizing duties.

The authorizing officer is responsible for furnishing, to the Director of the Federal Register, a current mailing list of officers or employees of his agency who are authorized to receive the FEDERAL REGISTER, the Code of Federal Regulations, and the Weekly Compilation of Presidential Documents for official use.

PART 17—PUBLICATION SCHEDULES

Sec.

- 17.1 Receipt and processing.

REGULAR SCHEDULE

- 17.2 Procedure and timing for regular schedule.

EMERGENCY SCHEDULE

- 17.3 Criteria for emergency schedule.
- 17.4 Procedure and timing for emergency schedule.
- 17.5 Transmittal from distant points.

DEFERRED SCHEDULE

- 17.6 Criteria.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23608, Nov. 4, 1972, unless otherwise noted.

§ 17.1 Receipt and processing.

Unless special arrangements are made with the Director of the Federal

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Register, the Office of the Federal Register receives documents only during official working hours. Upon receipt, each document shall be held for confidential processing until it is filed for public inspection.

REGULAR SCHEDULE

§ 17.2 Procedure and timing for regular schedule.

(a) Each document received shall be assigned to the regular schedule unless the issuing agency makes special arrangements otherwise. Receipt of a document in the ordinary course of business is considered to be a request for publication on the regular schedule.

(b) The regular schedule for publication is as follows:

Received	Filed	Published
Monday	Wednesday	Thursday
Tuesday	Thursday	Friday
Wednesday	Friday	Monday
Thursday	Monday	Tuesday
Friday	Tuesday	Wednesday

Where a legal Federal holiday intervenes, one additional work day is added.

EMERGENCY SCHEDULE

§ 17.3 Criteria for emergency schedule.

The emergency schedule is designed to provide the fastest possible publication of a document involving the prevention, alleviation, control, or relief of an emergency situation.

§ 17.4 Procedure and timing for emergency schedule.

(a) Each agency requesting publication on the emergency schedule shall briefly describe the emergency and the benefits to be attributed to immediate publication in the **FEDERAL REGISTER**. The request shall be made by letter if time permits.

(b) The Director of the Federal Register shall assign a document to the emergency schedule whenever he concurs with a request for that action and it is feasible. The Director shall confirm the assignment as soon as possible.

(c) Each document assigned to the emergency schedule shall be published as soon as possible.

§ 17.5 Transmittal from distant points.

The text of a document assigned to the emergency schedule may be transmitted from a distant field installation to the Washington Office of the agency concerned by telecommunication. A certified transcription of the text may be filed in advance of receipt of the original document. The agency must file the original document at the earliest possible time. In such a case, the publication date is based on receipt of the certified transcribed copies by the Office of the Federal Register.

DEFERRED SCHEDULE

§ 17.6 Criteria.

A document may be assigned to the deferred schedule under the following conditions:

(a) There are technical problems, unusual tabulations, or illustrations, or the document is of such size as to require extraordinary processing time.

(b) The agency concerned requests a deferred publication date.

PART 18—PREPARATION AND TRANSMITTAL OF DOCUMENTS GENERALLY

Sec.

- 18.1 Original and copies required.
- 18.2 Prohibition on combined documents.
- 18.3 Submission of documents and letters of transmittal.
- 18.4 Form of document.
- 18.5 Certified copies.
- 18.6 Form of certification.
- 18.7 Signature.
- 18.8 Seal.
- 18.9 Style.
- 18.10 Illustrations and tabular material.
- 18.11 Forms.
- 18.12 Preamble requirements.
- 18.13 Withdrawal of filed documents.
- 18.14 Correction of errors in documents.
- 18.15 Correction of errors in printing.
- 18.16 [Reserved]
- 18.17 Effective dates and time periods.
- 18.20 Identification of subjects in agency regulations.

§ 18.1

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23609, Nov. 4, 1972, unless otherwise noted.

§ 18.1 Original and copies required.

(a) Except as provided in § 19.2 of this subchapter for Executive orders and proclamations, each agency submitting a document to be filed and published in the FEDERAL REGISTER shall send an original and two duplicate originals or certified copies.¹ However, if the document is printed or processed on both sides, the agency shall send, in addition to the original, three duplicate originals or certified copies.

(b) In the case of a document issued outside of the District of Columbia, an agency may submit certified text in place of the original. However, it must replace the certified text with the original document as soon as practicable for filing as required by Chapter 15 of Title 44, United States Code.

§ 18.2 Prohibition on combined documents.

(a) The Director of the Federal Register may not accept a document for filing and publication if it combines material that must appear under more than one category in the FEDERAL REGISTER. For example, a document may not contain both rule making and notice of proposed rule making material.

(b) Where two related documents are to be published in the same FEDERAL REGISTER issue, the agency may arrange with the Office of the Federal Register for the insertion of cross-references in each document.

§ 18.3 Submission of documents and letters of transmittal.

(a) Each document authorized or required by law to be filed with the

¹ As noted in a document appearing at 37 FR 24469, Nov. 17, 1972, agencies that computer process data expected to be published in the FEDERAL REGISTER are urged to consult with this office about possible use of agency tapes as the basis for publication. In many cases, computer printouts may be accepted in place of originals and copies.

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Office of the Federal Register, published in the FEDERAL REGISTER, or filed with the Administrative Committee shall be sent to the Director of the Federal Register.

(b) Except for cases involving special handling or treatment, there is no need for a letter of transmittal for a document submitted for filing and FEDERAL REGISTER publication.

§ 18.4 Form of document.

(a) Except as provided in paragraph (b) of this section, to be eligible for filing and publication in the FEDERAL REGISTER, a document must be typewritten on white bond paper approximately 8½ by 11 inches in size, double spaced, with left-hand margin of approximately 1½ inches and a right-hand margin of approximately 1 inch.

(b) A printed or processed document may be accepted for filing and publication if it is suitable as an archival original. However, a photostatic copy may not be accepted as an original document.

(c) A document in the form of a letter may not be accepted for filing or publication in the rules and regulations, proposed rule making, or notices categories of the FEDERAL REGISTER.

[37 FR 23609, Nov. 4, 1972, as amended at 50 FR 12468, Mar. 28, 1985]

§ 18.5 Certified copies.

(a) The certified copies or duplicate originals of each document must be attached to the original. Each copy or duplicate must be entirely clear and legible.

(b) Copies of a typewritten original may be the first two carbon copies of the ribbon original, positive photostats on paper with a matte surface, or electrostatic copies.

(c) Publication dates are determined at the time when clear and legible copies are received.

§ 18.6 Form of certification.

Each copy of each document submitted for filing and publication, except a Presidential document or a duplicate original, must be certified substantially as follows:

(Certified to be a true copy of the original)

signed by a certifying officer designated under § 16.1 of this chapter.

§ 18.7 Signature.

The original and each duplicate original document must be signed in ink, with the name and title of the official signing the document typed or stamped beneath his signature. Initialed or impressed signatures may not be accepted.

§ 18.8 Seal.

Use of a seal on an original document or certified copy is optional with the issuing agency.

§ 18.9 Style.

Each agency submitting a document for filing and publication shall prepare it in accordance with the following:

(a) Punctuation, capitalization, spelling, and other matters of style must conform, in general, to the current edition of the U.S. Government Printing Office Style Manual.

(b) The spelling of geographic names must conform to the decisions of the Board on Geographic Names, established by section 2 of the Act of July 25, 1947, 61 Stat. 456 (43 U.S.C. 364a).

(c) Descriptions of land must conform, so far as practicable, to the current edition of the "Specifications for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations" prepared by the Bureau of Land Management, Department of the Interior.

§ 18.10 Illustrations and tabular material.

(a) An original drawing, or a clear reproduction, of each map, chart, graph, or other illustration that is found to be a necessary part of a document to be filed and published may be accepted only after submission to the Director of the Federal Register at least 6 working days before the date on which publication is desired.

(b) A clear and legible reproduction of the original illustration, approximately 8½ by 11 inches, shall be included in the original document and each certified copy.

(c) Tabular material consisting of more than two typewritten pages that is to be a part of a document to be filed and published shall be submitted

to the Director at least 6 working days before the date on which publication is desired.

§ 18.11 Forms.

Except when considered necessary by the Director of the Federal Register, tabulated blank forms for applications, registrations, reports, contracts, and similar items, and the instructions for preparing the forms, may not be published in full. In place thereof, the agency concerned shall submit for publication a simple statement describing the purpose and use of each form and stating the places at which copies may be obtained.

§ 18.12 Preamble requirements.

(a) Each agency submitting a proposed or final rule document for publication shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal.

(b) The preamble shall be in the following format and contain the following information:

AGENCY: _____
(Name of Issuing agency)

ACTION: _____
(Notice of Intent), (Advance Notice of Proposed Rulemaking), (Proposed Rule), (Final Rule), (Other).

SUMMARY: _____
(Brief statements, in simple language, of: (i) the action being taken; (ii) the circumstances which created the need for the action; and (iii) the intended effect of the action.)

DATES: _____
(Comments must be received on or before: _____.) (Proposed effective date: _____.) (Effective date: _____.) (Hearing: _____.) (Other: _____.)

ADDRESSES: _____
(Any relevant addresses.)

FOR FURTHER INFORMATION CONTACT: _____

(For Executive departments and agencies, the name and telephone number of a person in the agency to contact for additional information about the document [Presidential Memorandum, 41 FR 42764, September 28, 1976].)

SUPPLEMENTARY INFORMATION: _____

(As required by the provisions of paragraph (c) of this section.)

(c) When the issuing agency determines that the information provided under paragraph (b) of this section is inadequate as a matter of law, or is insufficient to adequately inform a reader who is not an expert in the subject area, or that a report of additional information is in the public interest, the agency shall include in the preamble the following information, as applicable:

- (1) A discussion of the background and major issues involved;
- (2) In the case of a final rule, any significant differences between it and the proposed rule;
- (3) A response to substantive public comments received; and
- (4) Any other information the agency considers appropriate.

[41 FR 56624, Dec. 29, 1976]

§ 18.13 Withdrawal of filed documents.

A document that has been filed with the Office of the Federal Register and placed on public inspection as required by this chapter, may be withdrawn from publication by the submitting agency only by a timely written instrument revoking that document, signed by a duly authorized representative of the agency. Both the original and the revoking document, shall remain on file.

§ 18.14 Correction of errors in documents.

After a document has been filed for public inspection and publication, a substantive error in the text may be corrected only by the filing of another document effecting the correction.

§ 18.15 Correction of errors in printing.

(a) Typographical or clerical errors made in the printing of the FEDERAL REGISTER shall be corrected by insertion of an appropriate notation or a reprinting in the FEDERAL REGISTER published without further agency documentation, if the Director of the Federal Register determines that—

- (1) The error would tend to confuse or mislead the reader; or
- (2) The error would affect text subject to codification.

(b) The issuing agency shall review published documents and notify the Office of the Federal Register of printing errors found in published documents.

(c) If the error was in the document as submitted by the agency, the issuing agency must prepare and submit for publication a correction document.

[50 FR 12468, Mar. 28, 1985]

§ 18.16 [Reserved]

§ 18.17 Effective dates and time periods.

(a) Whenever practicable, each document submitted for publication in the FEDERAL REGISTER should set forth dates certain. Thus, a document should state "all comments received before July 3, 1972, will be considered" or "this amendment takes effect July 3, 1972," rather than stating a time period measured by a certain number of days after publication in the FEDERAL REGISTER. Where a document does contain a time period rather than a date certain, the FEDERAL REGISTER staff will insert a date certain to be computed as set forth in paragraph (b) of this section.

(b) Dates certain will be computed by counting the day after the publication day as one, and by counting each succeeding day, including Saturdays, Sundays, and holidays. However, where the final count would fall on a Saturday, Sunday, or holiday, the date certain will be the next succeeding Federal business day.

§ 18.20 Identification of subjects in agency regulations.

(a) *Existing regulations.* Each agency shall—

(1) Prepare a list of index terms for each of its existing Code of Federal Regulations parts; and

(2) Send the list to the Director of the Federal Register on or before December 31, 1981.

(b) *Federal Register documents.* Beginning April 1, 1982, each agency that submits a document that is published in the Rules and Regulations section or the Proposed Rules section of the FEDERAL REGISTER shall—

(1) Include a list of index terms for each Code of Federal Regulations Part affected by the document; and

(2) Place the list of index terms as the last item in the Supplementary Information portion of the preamble for the document.

(c) *Federal Register Thesaurus*. To prepare its list of index terms, each agency shall use terms contained in the Federal Register Thesaurus of Indexing Terms. Agencies may include additional terms not contained in the Thesaurus as long as the appropriate Thesaurus terms are also used. Copies of the Federal Register Thesaurus of Indexing Terms are available from the Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408.

[46 FR 7163, Jan. 22, 1981]

PART 19—EXECUTIVE ORDERS AND PRESIDENTIAL PROCLAMATIONS

Sec.

19.1 Form.

19.2 Routing and approval of drafts.

19.3 Routing and certification of originals and copies.

19.4 Proclamations calling for the observance of special days or events.

19.5 Proclamations of treaties excluded.

19.6 Definition.

AUTHORITY: Secs. 1 to 6 of E.O. 11030, 27 FR 5847, 3 CFR, 1959-1963 Comp., p. 610, and E.O. 11354, 32 FR 7695, 3 CFR, 1966-1970 Comp., p. 652.

SOURCE: 37 FR 23610, Nov. 4, 1972, unless otherwise noted.

§ 19.1 Form.

Proposed Executive orders and proclamations shall be prepared in accordance with the following requirements:

(a) The order or proclamation shall be given a suitable title.

(b) The order or proclamation shall contain a citation of the authority under which it is issued.

(c) Punctuation, capitalization, spelling, and other matters of style shall, in general, conform to the most recent edition of the U.S. Government Printing Office Style Manual.

(d) The spelling of geographic names shall conform to the decisions of the Board on Geographic Names, estab-

lished by section 2 of the Act of July 25, 1947, 61 Stat. 456 (43 U.S.C. 364a).

(e) Descriptions of tracts of land shall conform, so far as practicable, to the most recent edition of the "Specifications for Descriptions of Tracts of Land for Use in Executive Orders and Proclamations," prepared by the Bureau of Land Management, Department of the Interior.

(f) Proposed Executive orders and proclamations shall be typewritten on paper approximately 8 x 13 inches, shall have a left-hand margin of approximately 1½ inches and a right-hand margin of approximately 1 inch, and shall be double-spaced except that quotations, tabulations, and descriptions of land may be single-spaced.

(g) Proclamations issued by the President shall conclude with the following-described recitation:

IN WITNESS WHEREOF, I have hereunto set my hand this — day of —, in the year of our Lord —, and of the Independence of the United States of America the —.

§ 19.2 Routing and approval of drafts.

(a) A proposed Executive order or proclamation shall first be submitted, with seven copies thereof, to the Director of the Office of Management and Budget, together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations.

(b) If the Director of the Office of Management and Budget approves the proposed Executive order or proclamation, he shall transmit it to the Attorney General for his consideration as to both form and legality.

(c) If the Attorney General approves the proposed Executive order or proclamation, he shall transmit it to the Director of the Office of the Federal Register, National Archives and Records Administration: *Provided*, That in cases involving sufficient urgency the Attorney General may transmit it directly to the President: *And provided further*, That the au-

§ 19.3

thority vested in the Attorney General by this section may be delegated by him, in whole or in part, to the Deputy Attorney General, Solicitor General, or to such Assistant Attorney General as he may designate.

(d) After determining that the proposed Executive order or proclamation conforms to the requirements of § 19.1 and is free from typographical or clerical error, the Director of the Office of the Federal Register shall transmit it and three copies thereof to the President.

(e) If the proposed Executive order or proclamation is disapproved by the Director of the Office of Management and Budget or by the Attorney General, it shall not thereafter be presented to the President unless it is accompanied by a statement of the reasons for such disapproval.

§ 19.3 Routing and certification of originals and copies.

(a) If the order or proclamation is signed by the President, the original and two copies shall be forwarded to the Director of the Federal Register for publication in the FEDERAL REGISTER.

(b) The Office of the Federal Register shall cause to be placed upon the copies of all Executive orders and proclamations forwarded as provided in paragraph (a) of this section the following notation, to be signed by the Director or by some person authorized by him to sign such notation: "Certified to be a true copy of the original."

§ 19.4 Proclamations calling for the observance of special days or events.

Except as may be otherwise provided by law, responsibility for the preparation and presentation of proposed proclamations calling for the observance of special days, or other periods of time, or events, shall be assigned by the Director of the Office of Management and Budget to such agencies as he may consider appropriate. Such proposed proclamations shall be submitted to the Director at least 60 days before the date of the specified observance.

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§ 19.5 Proclamations of treaties excluded.

Consonant with the provisions of Chapter 15 of Title 44 of the United States Code (44 U.S.C. 1511), nothing in these regulations shall be construed to apply to treaties, conventions, protocols, or other international agreements, or proclamations thereof by the President.

§ 19.6 Definition.

The term "Presidential proclamations and Executive orders," as used in Chapter 15 of Title 44 of the United States Code (44 U.S.C. 1505(a)), shall, except as the President or his representative may hereafter otherwise direct, be deemed to include such attachments thereto as are referred to in the respective proclamations or orders.

PART 20—HANDLING OF UNITED STATES GOVERNMENT MANUAL STATEMENTS

Sec.

- 20.1 Liaison officers.
- 20.2 Preparation of agency statements.
- 20.3 Organization.
- 20.4 Description of program activities.
- 20.5 Sources of information.
- 20.6 Form, style, arrangement and apportionment of space.
- 20.7 Deadline dates.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23611, Nov. 4, 1972, unless otherwise noted.

§ 20.1 Liaison officers.

Each of the following shall appoint an officer to maintain liaison with the Office on matters relating to the United States Government Manual:

- (a) Agencies of the legislative and judicial branches.
- (b) Executive agencies that do not have a liaison officer designated under § 16.1 of this chapter or who wish to appoint a liaison officer for Manual matters other than the one designated under such § 16.1.
- (c) Quasi-official agencies represented in the Manual.

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(d) Any other agency that the Director believes should be included in the Manual.

Each liaison officer will insure his agency's compliance with Part 9 of this chapter and this Part 20.

[37 FR 23611, Nov. 4, 1972, as amended at 50 FR 12468, Mar. 28, 1985]

§ 20.2 Preparation of agency statements.

In accordance with schedules established under § 20.7 each agency shall submit for publication in the Manual an official draft of the information required by § 9.2 of this chapter and this Part 20.

§ 20.3 Organization.

(a) Information about lines of authority and organization may be reflected in a chart if the chart clearly delineates the agency's organizational structure. Charts must be submitted in duplicate in the form of clear prints suitable for photographing. Charts should be prepared so as to be perfectly legible when reduced to the size of a Manual page. Charts that do not meet this requirement will not be included in the Manual.

(b) Listings of heads of operating units should be arranged whenever possible to reflect relationships between units.

(c) Verbal descriptions or organization that duplicate information conveyed by charts or by lists of officials will not be published in the Manual.

§ 20.4 Description of program activities.

Descriptions should state clearly the public purposes that the agency serves, and the programs that carry out those purposes. Detailed descriptions of the responsibilities of individuals will not be accepted for publication in the Manual.

§ 20.5 Sources of information.

Pertinent sources of information useful to the public, in areas of public interest such as employment, consumer activities, contracts, services to small business, and other topics of public interest should be provided with each agency statement. These sources of information shall plainly identify the places at which the public

may obtain information or make submittals or requests.

§ 20.6 Form, style, arrangement and apportionment of space.

The form, style, and arrangement of agency statements and other materials included in the Manual and the apportionment of space therein shall be determined by the Director of the Federal Register. The U.S. Government Printing Office Style Manual is the applicable reference work in determining style.

§ 20.7 Deadline dates.

The Manual is published on a schedule designed to provide the public with information about their Government on a timely basis. Therefore, agencies must comply with the deadline dates established by the Director of the Federal Register for transmittal of statements and charts and for the verification of proofs. Failure to do so may result in publication of an outdated statement or the omission of important material, thus depriving members of the public of information they have a right to expect in a particular edition of the Manual.

PART 21—PREPARATION OF DOCUMENTS SUBJECT TO CODIFICATION

Subpart A—General

Sec.

21.1 Drafting.

21.2–21.3 [Reserved]

21.4 Descriptions of organization.

21.5 Separate documents for each title and chapter amended.

21.6 Notice of expiration of codified material.

CODE STRUCTURE

21.7 Titles and subtitles.

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NUMBERING

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21.15 Statements of policy and interpretations.

HEADINGS

- 21.16 Required document headings.
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AMENDMENTS

- 21.20 General requirements.

REFERENCES

- 21.21 General requirements: References.
- 21.22 References between or within titles.
- 21.23 Parallel citations of Code and FEDERAL REGISTER.
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EFFECTIVE DATE STATEMENT

- 21.30 General.

OMB CONTROL NUMBERS

- 21.35 OMB control numbers.

Subpart B—Citations of Authority

- 21.40 General requirements: Authority citations.
- 21.41 Agency responsibility.
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PLACEMENT

- 21.43 Placing and amending authority citations.
- 21.45 Nonstatutory authority.

FORM

- 21.51 General.
- 21.52 Statutory material.
- 21.53 Nonstatutory materials.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23611, Nov. 4, 1972, unless otherwise noted.

Subpart A—General

§ 21.1 Drafting.

(a) Each agency that prepares a document that is subject to codification shall draft it as an amendment to the Code of Federal Regulations, in accordance with this subchapter, before submitting it to the Office of the Federal Register.

(b) The agency shall place a promulgation statement in the document precisely describing the relationship of the new provisions to the Code.

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§§ 21.2—21.3 [Reserved]

§ 21.4 Descriptions of organization.

The Director of the Federal Register may designate documents submitted under section 552(a)(1)(A) of Title 5, United States Code, as "documents subject to codification" under special agreement with the issuing agency. The agreement must be in writing, signed by the head of the agency, or his designee, and stating that—

(a) Publication in the Code is necessary or desirable for the effective discharge of the agency's functions or activities; and

(b) Publication in the Code may be discontinued by the Administrative Committee for failure of the agency to keep publication current.

§ 21.5 Separate documents for each title and chapter amended.

Whenever an agency is taking an action that will amend more than one title, or more than one chapter, of the Code of Federal Regulations, it shall prepare a separate document for each title and each chapter that is to be amended.

§ 21.6 Notice of expiration of codified material.

(a) Whenever a document subject to codification expires after a specified period by its own terms or by law, the issuing agency shall submit a notification by document for publication in the FEDERAL REGISTER.

(b) If the preparation of the document is not practicable, the agency shall send a timely notice, in writing, to the Director of the Federal Register, stating that the document is no longer in effect, citing the pertinent terms.

CODE STRUCTURE

§ 21.7 Titles and subtitles.

(a) The major divisions of the Code are titles, each of which brings together broadly related Government functions.

(b) Subtitles may be used to distinguish between materials emanating from an overall agency and the material issued by its various components.

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Subtitles may also be used to group chapters within a title.

§ 21.8 Chapters and subchapters.

(a) The normal divisions of a title are chapters, assigned to the various agencies within a title descriptive of the subject matter covered by the agencies' regulations.

(b) Subchapters may be used to group related parts within a chapter.

§ 21.9 Parts, subparts, and undesignated center heads.

(a) The normal divisions of a chapter are parts, consisting of a unified body of regulations applying to a specific function of an issuing agency or devoted to specific subject matter under the control of that agency.

(b) Subparts or undesignated center heads may be used to group related sections within a part. Undesignated center heads may also be used to group sections within a subpart.

§ 21.10 Sections.

(a) The normal divisions of a part are sections. Sections are the basic units of the Code.

(b) When internal division is necessary, a section may be divided into paragraphs, and paragraphs may be further subdivided using the lettering indicated in § 21.11.

NUMBERING

§ 21.11 Divisions of the Code of Federal Regulations.

(a) Titles are numbered consecutively in Arabic throughout the Code.

(b) Subtitles are lettered consecutively in capitals throughout the title.

(c) Chapters are numbered consecutively in Roman capitals throughout each title.

(d) Subchapters are lettered consecutively in capitals throughout the chapter.

(e) Parts are numbered in Arabic throughout each title.

(f) Subparts may be lettered in capitals or be undesignated.

(g) Sections are numbered in Arabic throughout each part. A section number includes the number of the part followed by a decimal point and the number of the section. For exam-

ple, the section number for section 15 of Part 21 is "§ 21.15".

(h) The lettering for divisions of a section is as follows:

Division	Illustrative lettering
Paragraph.....	(a), (b), etc. (1), (2), etc. (i), (ii), etc.
Further subdivision of a paragraph.....	(A), (B), etc. (1), (2), etc. (i), (ii), etc.

§ 21.12 Reservation of numbers.

In a case where related parts or related sections are grouped under a heading, numbers shall be reserved at the end of each group to allow for expansion.

§ 21.13 Addition of new units between existing units.

(a) Whenever it is necessary to introduce a new part or section between existing consecutive parts or sections, the new part or section shall be designated by the addition of a lower case letter to the number of the preceding part or section. For example, a part inserted between Parts 31 and 32 is numbered "31a", and a section inserted between § 31.1 and § 31.2 is numbered "§ 31.1a".

(b) Whenever it is necessary to insert a paragraph between existing consecutive paragraphs, and revision of the entire paragraph is not desired, the new paragraph shall be designated by the addition of a hyphen and an Arabic number to the letter designating the preceding paragraph. For example, a paragraph inserted between paragraph (a) and (b) is designated "(a-1)".

§ 21.14 Keying to agency numbering systems.

The Director of the Federal Register may allow the keying of section numbers to correspond to a particular numbering system used by an agency only when, in his opinion, the keying will benefit both that agency and the public.

§ 21.15

§ 21.15 Statements of policy and interpretations.

(a) Whenever a statement of general policy or an interpretation, submitted pursuant to section 552(a)(1)(D) of Title 5, United States Code, applies to an entire part, it shall be included in or appended to that part.

(b) Whenever a statement of general policy or an interpretation applies to a specific section it shall be appended to that section.

(c) Statements of policy and interpretations that are broader in scope than those covered by paragraphs (a) and (b) of this section shall be assigned to a part or group of parts within the chapter affected.

HEADINGS

§ 21.16 Required document headings.

(a) Each rule and proposed rule document submitted to the Office of the Federal Register shall contain the following headings, when appropriate, on separate lines in the following order:

- (1) Agency name;
- (2) Subagency name;
- (3) Numerical references to the CFR title and parts affected;
- (4) Agency numbers of identifying symbol in brackets, if used;
- (5) Brief subject heading describing the document.

(b) Each CFR section in the regulatory text of the document shall have a brief descriptive heading, preceding the text, on a separate line.

[50 FR 12468, Mar. 28, 1985]

§ 21.18 Tables of contents.

A table of contents shall be used at the beginning of the part whenever a new part is introduced, an existing part is completely revised, or a group of sections is revised or added and set forth as a subpart or otherwise separately grouped under a center head. The table shall follow the part heading and precede the text of the regulations in that part. It shall also list the headings for the subparts, undesignated center headings, and sections in the part.

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§ 21.19 Composition of part headings.

Each part heading shall indicate briefly the general subject matter of the part. Phrases such as "Regulations under the Act of July 28, 1955" or other expressions that are not descriptive of the subject matter may not be used. Introductory expressions such as "Regulations governing" and "Rules applicable to" may not be used.

AMENDMENTS

§ 21.20 General requirements.

(a) Each amendatory document shall identify in specific terms the unit amended, and the extent of the changes made.

(b) The number and heading of each section amended shall be set forth in full on a separate line.

REFERENCES

§ 21.21 General requirements: References.

(a) Each reference to the Code of Federal Regulations shall be in terms of the specific titles, chapters, parts, sections, and paragraphs involved. Ambiguous references such as "herein", "above", "below", and similar expressions may not be used.

(b) Each document that contains a reference to material published in the Code shall include the Code citation as a part of the reference.

(c) Each agency shall publish its own regulations in full text. Cross-references to the regulations of another agency may not be used as a substitute for publication in full text, unless the Office of the Federal Register finds that the regulation meets any of the following exceptions:

(1) The reference is required by court order, statute, Executive order or reorganization plan.

(2) The reference is to regulations promulgated by an agency with the exclusive legal authority to regulate in a subject matter area, but the referencing agency needs to apply those regulations in its own programs.

(3) The reference is informational or improves clarity rather than being regulatory.

(4) The reference is to test methods or consensus standards produced by a

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Federal agency that have replaced or preempted private or voluntary test methods or consensus standards in a subject matter area.

(5) The reference is to the Department level from a subagency.

[37 FR 23611, Nov. 4, 1972, as amended at 50 FR 12468, Mar. 28, 1985]

§ 21.22 References between or within titles.

Unless the meaning is otherwise precisely expressed and an undue or awkward repetition would result; the following references shall be used:

(a) *Between titles.* When reference is made to material codified in a title other than that in which the reference occurs, the short form of citation shall be used. For example, a reference within Title 41 to § 2.4 of Title 1 is "1 CFR 2.4".

(b) *Within titles.* When reference is made to material codified in the same title, the following forms shall be used, as appropriate:

Chapter — of this title.

Part — of this title.

§ — of this title.

(c) *Within chapters.* When reference is made to material codified in the same chapter, the following forms shall be used, as appropriate:

Part — of this chapter.

§ — of this chapter.

(d) *Within sections.* When reference is made to material codified in the same section, the following forms shall be used, as appropriate:

Paragraph (—) of this section.

§ 21.23 Parallel citations of Code and Federal Register.

For parallel reference, the Code of Federal Regulations and the FEDERAL REGISTER may be cited in the following forms, as appropriate:

— CFR — (— FR —).

§ — of this chapter (— FR —).

§ 21.24 References to 1938 edition of Code.

When reference is made to material codified in the 1938 edition of the Code of Federal Regulations, or a supplement thereto, the following forms may be used, as appropriate:

— CFR, 1938 Ed., —.

— CFR, 1943, Cum. Supp., —.

— CFR, 1946 Supp., —.

EFFECTIVE DATE STATEMENT

§ 21.30 General.

Each document subject to codification shall include a clear statement as to the date or dates upon which its contents become effective.

OMB CONTROL NUMBERS

§ 21.35 OMB control numbers.

To display OMB control numbers in agency regulations, those numbers shall be placed parenthetically at the end of the section or displayed in a table or codified section.

[50 FR 12468, Mar. 28, 1985]

Subpart B—Citations of Authority

§ 21.40 General requirements: Authority citations.

Each section in a document subject to codification must include, or be covered by, a complete citation of the authority under which the section is issued, including—

(a) General or specific authority delegated by statute; and

(b) Executive delegations, if any, necessary to link the statutory authority to the issuing agency.

[50 FR 12468, Mar. 28, 1985]

§ 21.41 Agency responsibility.

(a) Each issuing agency is responsible for the accuracy and integrity of the citations of authority in the documents it issues.

(b) Each issuing agency shall formally amend the citations of authority in its codified material to reflect any changes therein.

§ 21.42 Exceptions.

The Director of the Federal Register may make exceptions to the requirements of this subpart relating to placement and form of citations of authority whenever he determines that strict application would impair the practical use of the citations.

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PLACEMENT

§ 21.43 Placing and amending authority citations.

(a) The requirements for placing authority citations vary with the type of amendment the agency is making in a document. The agency shall set out the full text of the authority citation for each Part affected by the document.

(1) If a document sets out an entire CFR part, the agency shall place the complete authority citation directly after the table of contents and before the regulatory text.

(2) If a document amends only certain sections within a CFR part, the agency shall present the complete authority citation to this part as the first item in the list of amendments.

(i) If the authority for issuing an amendment is the same as the authority listed for the whole CFR part, the agency shall simply restate the authority.

(ii) If the authority for issuing an amendment changes the authority citation for the whole CFR part, the agency shall revise the authority citation in its entirety. The agency may specify the particular authority under which certain sections are amended in the revised authority citation.

(b) The agency shall present a centralized authority citation. The authority citation shall appear at the end of the table of contents for a part or at the end of each subpart within a part. Citations of authority for particular sections may be specified within the centralized authority citation.

[50 FR 12469, Mar. 28, 1985]

§ 21.45 Nonstatutory authority.

Citation to a document as authority shall be placed after the statutory citations. For example:

AUTHORITY: Sec. 9, Pub. L. 89-670, 80 Stat. 944 (49 U.S.C. 1657). E.O. 11222, 30 FR 6469, 3 CFR, 1965 Comp., p. 10.

FORM

§ 21.51 General.

(a) Formal citations of authority shall be in the shortest form compati-

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ble with positive identification and ready reference.

(b) The Office of the Federal Register shall assist agencies in developing model citations.

§ 21.52 Statutory material.

(a) *United States Code.* All citations to statutory authority shall include a United States Code citation, where available. Citations to titles of the United States Code, whether or not enacted into positive law, shall be cited as follows without Public Law or U.S. Statutes at Large citation.

10 U.S.C. 501

(b) Citations to Public Laws and U.S. Statutes at Large are optional when the United States Code is cited.

(1) *Public Laws.* Citations to current public laws shall include reference to the volume and page of the U.S. Statutes at Large to which they have been assigned. For example:

Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654)

(2) *U.S. Statutes at Large.* Citations to the U.S. Statutes at Large shall refer to section, page, and volume. The page number should refer to the page on which the section cited begins. For example:

Sec. 5, Pub. L. 89-670, 80 Stat. 935 (49 U.S.C. 1654); sec. 313, Pub. L. 85-726, 72 Stat. 752 (49 U.S.C. 1354)

[50 FR 12469, Mar. 28, 1985]

§ 21.53 Nonstatutory materials.

Nonstatutory documents shall be cited by document designation and by FEDERAL REGISTER volume and page, followed, if possible, by the parallel citation to the Code of Federal Regulations. For example:

Special Civil Air Reg. SR-422A, 28 FR 6703, 14 CFR Part 4b. E.O. 11130, 28 FR 12789; 3 CFR 1959-1963 Comp.

PART 22—PREPARATION OF NOTICES AND RULE MAKING PROPOSALS

NOTICES IN GENERAL

Sec.

22.1 Name of issuing agency and subdivision.

22.2 Authority citation.

NOTICES OF PROPOSED RULE MAKING

22.5 General requirements.

22.6 Code designation.

22.7 Codification.

AUTHORITY: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954-1958 Comp., p. 189.

SOURCE: 37 FR 23614, Nov. 4, 1972, unless otherwise noted.

NOTICES IN GENERAL

§ 22.1 Name of issuing agency and subdivision.

(a) The name of the agency issuing a notice shall be placed at the beginning of the document.

(b) Whenever a specific bureau, service, or similar unit within an agency issues a notice, the name of that bureau, service, or unit shall be placed on a separate line below the name of the agency.

(c) An agency that uses file numbers, docket numbers, or similar identifying symbols shall place them in brackets immediately below the other headings required by this section.

(d) A suitable short title identifying the subject shall be provided beginning on a separate line immediately after the other required caption or

captions. Whenever appropriate, an additional brief caption indicating the nature of the document shall be used.

§ 22.2 Authority citation.

The authority under which an agency issues a notice shall be cited in narrative form within text or in parentheses on a separate line following text.

NOTICES OF PROPOSED RULE MAKING

§ 22.5 General requirements.

Each notice of proposed rule making required by section 553 of Title 5, United States Code, or any other statute, and any similar notice voluntarily issued by an agency shall include a statement of—

(a) The time, place, and nature of public rule making proceedings; and

(b) Reference to the authority under which the regulatory action is proposed.

§ 22.6 Code designation.

The area of the Code of Federal Regulations directly affected by a proposed regulatory action shall be identified by placing the appropriate CFR citation in brackets immediately below the name of the issuing agency. For example:

[1 CFR Part 22]

§ 22.7 Codification.

Any part of a notice of proposed rule making document that contains the full text of a proposed regulation shall also conform to the pertinent provisions of Part 21 of this chapter.

the following: (1) the patient's condition; (2) the patient's wishes; (3) the patient's family; (4) the patient's community; (5) the patient's country.

The first of these is the patient's condition. The physician should always consider the patient's condition as the first and most important factor in his decision-making.

The second factor is the patient's wishes. The physician should always consider the patient's wishes as the second most important factor in his decision-making.

The third factor is the patient's family. The physician should always consider the patient's family as the third most important factor in his decision-making.

The fourth factor is the patient's community. The physician should always consider the patient's community as the fourth most important factor in his decision-making.

The fifth factor is the patient's country. The physician should always consider the patient's country as the fifth most important factor in his decision-making.

The sixth factor is the patient's religion. The physician should always consider the patient's religion as the sixth most important factor in his decision-making.

The seventh factor is the patient's race. The physician should always consider the patient's race as the seventh most important factor in his decision-making.

The eighth factor is the patient's sex. The physician should always consider the patient's sex as the eighth most important factor in his decision-making.

The ninth factor is the patient's age. The physician should always consider the patient's age as the ninth most important factor in his decision-making.

The tenth factor is the patient's education. The physician should always consider the patient's education as the tenth most important factor in his decision-making.

The eleventh factor is the patient's occupation. The physician should always consider the patient's occupation as the eleventh most important factor in his decision-making.

The twelfth factor is the patient's social class. The physician should always consider the patient's social class as the twelfth most important factor in his decision-making.

The thirteenth factor is the patient's personality. The physician should always consider the patient's personality as the thirteenth most important factor in his decision-making.

The fourteenth factor is the patient's intelligence. The physician should always consider the patient's intelligence as the fourteenth most important factor in his decision-making.

The fifteenth factor is the patient's health. The physician should always consider the patient's health as the fifteenth most important factor in his decision-making.

The sixteenth factor is the patient's wealth. The physician should always consider the patient's wealth as the sixteenth most important factor in his decision-making.

The seventeenth factor is the patient's power. The physician should always consider the patient's power as the seventeenth most important factor in his decision-making.

The eighteenth factor is the patient's influence. The physician should always consider the patient's influence as the eighteenth most important factor in his decision-making.

The nineteenth factor is the patient's reputation. The physician should always consider the patient's reputation as the nineteenth most important factor in his decision-making.

The twentieth factor is the patient's fame. The physician should always consider the patient's fame as the twentieth most important factor in his decision-making.

The twenty-first factor is the patient's honor. The physician should always consider the patient's honor as the twenty-first most important factor in his decision-making.

The twenty-second factor is the patient's glory. The physician should always consider the patient's glory as the twenty-second most important factor in his decision-making.

The twenty-third factor is the patient's prestige. The physician should always consider the patient's prestige as the twenty-third most important factor in his decision-making.

The twenty-fourth factor is the patient's respect. The physician should always consider the patient's respect as the twenty-fourth most important factor in his decision-making.

The twenty-fifth factor is the patient's admiration. The physician should always consider the patient's admiration as the twenty-fifth most important factor in his decision-making.

The twenty-sixth factor is the patient's awe. The physician should always consider the patient's awe as the twenty-sixth most important factor in his decision-making.

The twenty-seventh factor is the patient's fear. The physician should always consider the patient's fear as the twenty-seventh most important factor in his decision-making.

The twenty-eighth factor is the patient's love. The physician should always consider the patient's love as the twenty-eighth most important factor in his decision-making.

The twenty-ninth factor is the patient's devotion. The physician should always consider the patient's devotion as the twenty-ninth most important factor in his decision-making.

The thirtieth factor is the patient's loyalty. The physician should always consider the patient's loyalty as the thirtieth most important factor in his decision-making.

The thirty-first factor is the patient's honesty. The physician should always consider the patient's honesty as the thirty-first most important factor in his decision-making.

The thirty-second factor is the patient's integrity. The physician should always consider the patient's integrity as the thirty-second most important factor in his decision-making.

The thirty-third factor is the patient's justice. The physician should always consider the patient's justice as the thirty-third most important factor in his decision-making.

CHAPTER II—OFFICE OF THE FEDERAL REGISTER

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PART 51—INCORPORATION BY REFERENCE

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AUTHORITY: 5 U.S.C. 552(a).

SOURCE: 47 FR 34108, Aug. 6, 1982, unless otherwise noted.

§ 51.1 Policy.

(a) Section 552(a) of title 5, United States Code, provides, in part, that "matter reasonably available to the class of persons affected thereby is deemed published in the FEDERAL REGISTER when incorporated by reference therein with the approval of the Director of the Federal Register."

(b) The Director will interpret and apply the language of section 552(a) together with other requirements which govern publication in the FEDERAL REGISTER and the Code of Federal Regulations. Those requirements which govern publication include—

(1) The Federal Register Act (44 U.S.C. 1501 *et seq.*)

(2) The Administrative Procedure Act (5 U.S.C. 551 *et seq.*);

(3) The regulations of the Administrative Committee of the Federal Register under the Federal Register Act (1 CFR Ch. I); and

(4) The acts which require publication in the FEDERAL REGISTER (See CFR volume entitled "CFR Index and Finding Aids.")

(c) The Director will assume in carrying out the responsibilities for incorporation by reference that incorporation by reference—

(1) Is intended to benefit both the Federal Government and the members of the class affected; and

(2) Is not intended to detract from the legal or practical attributes of the system established by the Federal Register Act, the Administrative Procedure Act, the regulations of the Administrative Committee of the Federal Register, and the acts which require publication in the FEDERAL REGISTER.

(d) The Director will carry out the responsibilities by applying the standards of Part 51 fairly and uniformly.

(e) Publication in the FEDERAL REGISTER of a document containing an incorporation by reference does not of itself constitute an approval of the incorporation by reference by the Director.

(f) Incorporation by reference of a publication is limited to the edition of the publication that is approved. Future amendments or revisions of the publication are not included.

§ 51.3 When will the Director approve a publication?

(a) The Director will approve the incorporation by reference of a publication when the following requirements are met:

(1) The publication is eligible for incorporation by reference (See § 51.7).

(2) The language of incorporation meets the requirements of this part (See § 51.9).

(3) The publication is on file with the Office of the Federal Register.

(4) The Director has received a written request from the agency to approve the incorporation by reference of the publication.

(b) The Director will notify the agency of the approval or disapproval of an incorporation by reference within 20 working days after the agency has met all the requirements for requesting approvals (See § 51.5).

§ 51.5 How does an agency request approval?

(a) Formal approval of a publication for incorporation by reference applies to a final rule document. For timely approval by the Director of the Federal Register, the agency must—

(1) Make a written request for approval at least 20 working days before the agency intends to submit the final rule document for publication;

(2) Send with the written request a copy of the final rule document that uses the proper language of incorporation; and

(3) Ensure that a copy of the publication is on file at the Office of the Federal Register.

(b) Agencies may consult with the Office of the Federal Register at any

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time with respect to the requirements of this part.

§ 51.7 What publications are eligible?

(a) A publication is eligible for incorporation by reference under 5 U.S.C. 552(a) if it—

(1) Conforms to the policy stated in § 51.1;

(2) Is published data, criteria, standards, specifications, techniques, illustrations, or similar material;

(3) Substantially reduces the volume of material published in the **FEDERAL REGISTER**; and

(4) Is reasonably available to and usable by the class of persons affected by the publication. In determining whether a publication is usable, the Director will consider—

(i) The completeness and ease of handling of the publication; and

(ii) Whether it is bound, numbered, and organized.

(b) The Director will assume that a publication produced by the same agency that is seeking its approval is inappropriate for incorporation by reference. A publication produced by the agency may be approved, if, in the judgment of the Director, it meets the requirements of paragraph (a) and possesses other unique or highly unusual qualities. A publication may be approved if it cannot be printed using the **FEDERAL REGISTER/Code of Federal Regulations** printing system.

(c) The following materials are not appropriate for incorporation by reference:

(1) Material published previously in the **FEDERAL REGISTER**.

(2) Material published in the *United States Code*.

§ 51.9 What is the proper language of incorporation?

(a) The language incorporating a publication by reference shall be as precise and complete as possible and shall make it clear that the incorporation by reference is intended and completed by the final rule document in which it appears.

(b) The language incorporating a publication by reference is precise and complete if it—

(1) Uses the words "incorporated by reference;"

(2) States the title, date, edition, author, publisher, and identification number of the publication;

(3) Informs the user that the incorporated publication is a requirement;

(4) Makes an official showing that the publication is in fact available by stating where and how copies may be examined and readily obtained with maximum convenience to the user; and

(5) Refers to 5 U.S.C. 552(a).

(c) If the Director approves a publication for incorporation by reference, the agency must—

(1) Include the following under the **DATES** caption of the preamble to the final rule document (See 1 CFR 18.12 *Preamble requirements*):

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of —.

(2) Includes the term "incorporation by reference" in the list of index terms (See 1 CFR 18.20 *Identification of subjects in agency regulations*).

§ 51.11 How does an agency change or remove an approved incorporation?

(a) An agency that seeks approval for a change to a publication that is approved for incorporation by reference must—

(1) Publish notice of the change in the **FEDERAL REGISTER** and amend the **Code of Federal Regulations**;

(2) Ensure that a copy of the amendment or revision is on file at the Office of the Federal Register; and

(3) Notify the Director of the Federal Register in writing that the change is being made.

(b) If a regulation containing an incorporation by reference fails to become effective or is removed from the **Code of Federal Regulations**, the agency must notify the Director of the Federal Register in writing of that fact within 5 working days of the occurrence.

CHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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PART 301—ORGANIZATION AND PURPOSE

Sec.

- 301.1 Establishment; location.
- 301.2 Purpose.
- 301.3 Organization.
- 301.4 Activities.
- 301.5 Office of the Chairman.

AUTHORITY: 5 U.S.C. 552, 571-576.

SOURCE: 40 FR 10441, Mar. 6, 1975, unless otherwise noted.

§ 301.1 Establishment; location.

The Administrative Conference of the United States was established as a permanent independent agency of the Federal Government by the Administrative Conference Act (5 U.S.C. 571-576), enacted in 1964. The Conference offices are located at 2120 L Street, NW., Suite 500, Washington, D.C. 20037.

§ 301.2 Purpose.

The purpose of the Administrative Conference is to develop improvements in the legal procedures by which Federal agencies administer regulatory, benefit, and other Government programs. As members of the Conference, agency heads, other Federal officials, private lawyers, university professors, and other experts in administrative law and government are provided with a forum in which they can conduct continuing studies of selected problems involving these administrative procedures and can combine their experience and judgment in cooperative efforts toward improving the fairness and effectiveness of such procedures.

§ 301.3 Organization.

The Chairman of the Administrative Conference of the United States is appointed by the President, with the advice and consent of the Senate, for a five-year term. The Council, which is the executive board, consists of the Chairman and 10 other members who are appointed by the President for three-year terms, of whom not more than one-half may be drawn from Federal agencies. It has authority to call plenary sessions of the Conference and fix their agenda, to recommend subjects for study, to receive and con-

sider reports and recommendations before they are considered by the Assembly, and to exercise general budgetary and policy supervision. The total membership of the Conference may not, by statute, exceed 91. It comprises, in addition to the Council, approximately 44 Government members (heads of agencies or their designees) from 36 departments and agencies, and approximately 36 non-Government or public members (lawyers in private practice, university faculty members, and others specially informed in law and government) appointed by the Chairman with the approval of the Council for two-year terms. The Chairman is the only full-time compensated member. The entire membership is divided into six committees, each assigned a broad area of interest as follows: Adjudication, Administration, Governmental Processes, Judicial Review, Regulation, and Rule-making. The membership meeting in plenary session is called the Assembly of the Administrative Conference. The Council must call at least one plenary session each year.

[47 FR 58207, Dec. 30, 1982]

§ 301.4 Activities.

Subjects for inquiry are developed by the Chairman, the Council, the committees, and the Assembly. The committees, with the assistance of staff and consultants, conduct thorough studies of these subjects and develop proposed recommendations and supporting reports. Reports and recommendations are considered by the Council and are distributed to the membership, with the views and recommendations of the Council, to be placed on the agenda of the next plenary session. The Assembly has complete authority to approve, amend, remand, or reject recommendations presented by the committees. The deliberations of the Assembly are public. Recommendations adopted by the Conference may call for new legislation or for action on the part of affected agencies. The Assembly also has authority to adopt bylaws for carrying out the functions of the Conference. The Conference collects information and statistics from departments and

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agencies and publishes such reports as it considers useful for evaluating and improving administrative process. The Conference also serves as a forum for the interchange among departments and agencies of information which may be useful in improving administrative practices and procedures.

§ 301.5 Office of the Chairman.

The Chairman is the chief executive of the Conference. He is served by a small permanent staff. The Chairman is authorized to encourage the departments and agencies to adopt the recommendations of the Conference and is required by the Administrative Conference Act to transmit to the President and to Congress an annual report that interim reports concerning the activities of the Conference, including reports on the implementation of its recommendations. The Chairman is authorized to make independent inquiries into procedural matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Government. The purpose of conducting inquiries into such individual problems is not to review the results in particular cases, but rather to determine whether the problems should be made the subject of Conference study in the interests of developing fair and effective procedures for such cases. Upon the request of the head of a department or agency, the Chairman is authorized to furnish advice and assistance on matters of administrative procedure.

PART 302—BYLAWS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Sec.

- 302.1 Establishment and objective.
- 302.2 Membership.
- 302.3 Committees.
- 302.4 Liaison arrangements.
- 302.5 Avoidance of conflicts of interest.
- 302.6 General.

AUTHORITY: 5 U.S.C. 552, 571-576.

§ 302.1 Establishment and objective.

The Administrative Conference Act, 5 U.S.C. 571 *et seq.* (1970), 78 Stat. 615 (1964), authorized the establishment

of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers and duties of the Conference.

[40 FR 10442, Mar. 6, 1975]

§ 302.2 Membership.

(a) *General.* (1) Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the non-attendance. If not satisfied by such reasons, the Chairman shall: (i) In the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention; or (ii) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

(b) *Terms of Non-Government Members.* The terms of non-Government

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members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year intervals from June 30, 1970. No non-Government members, other than senior fellows, shall at any time be in continuous service beyond four full terms.

(c) *Eligibility and Replacements.* (1) A member designated by a Federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(d) *Alternates.* Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (a)(2) of this section.

(e) *Senior Fellows.* The Chairman may, with the approval of the Council, appoint persons who have served as members of the Conference for eight or more years, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals from June 30, 1970. Senior fellows shall have all the privileges of members, but may not vote.

[40 FR 10442, Mar. 6, 1975, as amended at 41 FR 29653, July 19, 1976; 45 FR 2307, Jan. 11, 1980; 47 FR 30702, July 15, 1982]

§ 302.3 Committees.

The Conference shall have the following standing committees:

1. Committee on Adjudication;
2. Committee on Administration;
3. Committee on Governmental Processes;
4. Committee on Judicial Review;
5. Committee on Regulation; and
6. Committee on Rulemaking.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

[40 FR 10442, Mar. 6, 1975, as amended at 47 FR 58308, Dec. 30, 1982]

§ 302.4 Liaison arrangements.

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, and Federal agencies which are not represented on the Conference, and professional associations. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

[40 FR 10442, Mar. 6, 1975, as amended at 41 FR 29653, July 19, 1976]

§ 302.5 Avoidance of conflicts of interest.

(a) *Disclosure of Interests.* (1) Non-Government members (including senior fellows) may be deemed to be special government employees within the meaning of 18 U.S.C. 202 and subject to the provisions of §§ 201-224 of Title 18 United States Code, in accordance with their terms. The Chairman of the Conference is authorized to prescribe requirements for the filing of statements of employment and financial interests necessary to comply with Part III of Executive Order 11222, as amended, or any successor Presidential or statutory requirement. Without conceding the correctness of the view that non-Government members are special Government employees, the

Conference has chosen to adopt the bylaw provisions that follow in order to eliminate whatever uncertainties might otherwise exist concerning the propriety of participation in Conference proceedings.

(2) In addition to complying with any requirement prescribed by statute or Executive order, each member, public or governmental, shall, upon appointment to the Conference and annually thereafter, file a brief general statement describing the nature of his or her practice or affiliations, including, in the case of a member of a partnership, a general statement about the nature of the business or practice of the partnership, to the extent that such business, practice, or affiliations might reasonably be thought to affect the member's judgment on matters with which the Conference is concerned. (For example, a member might state that he or she represents employers or unions before the National Labor Relations Board, broadcasters before the Federal Communications Commission, or consumer groups before agencies and courts.) The chairman will include with the agenda for each plenary session a statement calling to the attention of the members the requirements of this section. Each member who believes the content of the agenda calls for disclosure additional to that already on file will file an amended statement concerning his or her interests. Current statements of all members will be open to public inspection at the Office of the Chairman and will be readily available at any plenary session. Except as provided in paragraph (b) of this section, members may vote or participate in matters before the Conference without additional disclosure of interest.

(b) *Disqualifications.* (1) In accordance with 18 U.S.C. 208 a member shall not, except as provided in paragraphs (b) (2) or (3) of this section, vote or otherwise participate as a member in the disposition of any particular matter of Conference business, including the adoption of recommendations and other statements, in which, to his or her knowledge, the member has a financial interest. For purposes of this paragraph (b) a

member is deemed to have a financial interest in any particular matter in which the member, the member's spouse, minor child, partner, organization in which the member is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(2) Notwithstanding paragraph (b)(1) of this section, a member may, at any stage of Conference consideration and without further disclosure, participate and vote on a proposed recommendation or other Conference statement or action relating to the procedure of any Federal agency or agencies, where the Conference action is not directed to and is unlikely to affect the substantive outcome of any pending judicial matter or administrative proceeding involving a specific party or parties (other than the United States) in which to his knowledge he has a financial interest. The Conference determines pursuant to 18 U.S.C. 208(b) that in such a case any financial interest which the member may have in the matter before the Conference is too remote to affect the integrity of the member's service to the Conference.

(3) Where a member believes that he or she is or may be disqualified from participating in the disposition of a matter before the Conference under the provisions of this subsection, the member may advise the Chairman of the reason for his or her possible disqualification, including a full disclosure of the financial interest involved. If the Chairman determines in writing pursuant to 18 U.S.C. 208(b) that the interest is not so substantial as to be likely to affect the integrity of the member's service to the Conference, the member may, upon receipt of such determination, vote and otherwise participate in the disposition of the matter.

[43 FR 28806, July 3, 1978, as amended at 47 FR 30702, July 15, 1982]

§ 302.6 General.

(a) *Meetings.* All sessions of the Assembly shall be open to the public.

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Privileges of the floor, however, extend only to members of the Conference, to senior fellows, to liaison representatives, to consultants and staff members insofar as matters on which they have been engaged are under consideration, and to persons who, prior to the commencement of the meeting have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(b) *Quorums.* A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(c) *Separate Statements.* (1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the **FEDERAL REGISTER**. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(d) *Amendment of Bylaws.* The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(e) *Procedure.* Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

[40 FR 10442, Mar. 6, 1975. Redesignated at 43 FR 28806, July 3, 1978, and amended at 47 FR 30702, July 15, 1982]

1 CFR Ch. III (1-1-86 Edition)

PART 303—EMPLOYEE RESPONSIBILITIES AND CONDUCT

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303.108 Statements of employment and financial interest.

303.109 Statements of employment of special Government employees.

AUTHORITY: E.O. 11222, 30 FR 6469, 3 CFR 1965 Supp.; 5 CFR 735.101 et seq.

SOURCE: 43 FR 28806, July 3, 1978, unless otherwise noted.

§ 303.101 Adoption of regulations.

Pursuant to 5 CFR 735.104(f), the Administrative Conference of the United States hereby adopts the following sections of Part 735 of Title 5, Code of Federal Regulations: 735.101, 735.102, 735.201(a), 735.202 (a), (d), (e), (f), 735.203-735.210, 735.302, 735.303(a), 735.304, 735.305(a), 735.306, 735.403(a), 735.404-735.411, 735.412 (b) and (d). These adopted sections are modified and supplemented as set forth in this part.

§ 303.102 Definitions.

In this part:

(a) "Agency" means the Administrative Conference of the United States.

(b) "Employee" means an employee of the agency, but does not include a special Government employee.

(c) "Executive Order" means Executive Order 11222 of May 8, 1965.

(d) "Person" means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

(e) "Special Government employee" means a "special Government employee" as defined in section 202 of Title 18, United States Code, who is employed by the Administrative Conference, and shall include non-Govern-

ment members of the Conference except where otherwise provided.¹

§ 303.103 Review of statements of employment and financial interests.

Each statement of employment and financial interest submitted under this part shall be reviewed by the Chairman, or, in the case of statements submitted by special Government employees, by the Executive Director. When this review indicates a conflict between the interests of an employee or special Government employee of the agency and the performance of his services for the Government, the reviewing official shall have the indicated conflict brought to the attention of the employee or special Government employee, grant the employee or special Government employee an opportunity to explain the indicated conflict, and attempt to resolve the indicated conflict.

§ 303.104 Disciplinary and other remedial action.

An employee or special Government employee of the agency who violates any of the regulations in this part or adopted under § 303.101 may be disciplined. The disciplinary action may be in addition to any penalty prescribed by law for the violation. In addition to or in lieu of disciplinary action, remedial action to end conflicts or appearance of conflicts of interest may include but is not limited to:

- (a) Changes in assigned duties;
- (b) Divestment by the employee or special Government employee of his conflicting interest; or
- (c) Disqualification for a particular assignment.

§ 303.105 Gifts, entertainment, and favors.

The agency authorizes the exceptions to 5 CFR 735.202(a) set forth in 5 CFR 735.202(b) (1) through (4).

§ 303.106 Outside employment and other activity.

An employee of the agency may engage in outside employment or other outside activity not incompatible with the full and proper discharge of the duties and responsibilities of his Government employment. An employee who engages in outside employment shall report that fact in writing to his supervisor.

§ 303.107 Specific provisions of agency regulations governing special Government employees.

(a) Special Government employees of the agency shall adhere to the standards of conduct set forth in 5 CFR 735.302-735.306 and adopted under § 303.101.

(b) Special Government employees of the agency may teach, lecture, or write in a manner not inconsistent with 5 CFR 735.203(c).

(c) Pursuant to 5 CFR 735.305(b), the agency authorizes the same exceptions concerning gifts, entertainment, and favors for special Government employees as are authorized for employees by § 303.105.

(d) Procedures for the avoidance of conflicts of interest by members of the Conference in the consideration of matters before the Conference are set forth in section 5 of the Conference bylaws, § 302.5 of this chapter.

§ 303.108 Statements of employment and financial interest.

(a) Employees in the following named positions shall submit statements of employment and financial interest, including supplementary statements, as required by 5 CFR 735.405 and 735.406:

- (1) Executive Director.
- (2) Executive Secretary.
- (3) Research Director.

(b) Each statement of employment and financial interest required by this section shall be submitted to the Chairman of the Administrative Conference of the United States.

¹The Department of Justice has concluded that non-Government members of the Conference are special Government employees, as defined in 18 U.S.C. 202. Without conceding the correctness of this view and in the interest of eliminating uncertainties, the Conference, in its bylaws and regulations, treats non-Government members as special Government employees. See § 302.5 of this chapter.

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(c) Pursuant to the authority contained in 18 U.S.C. 208(b) and 5 CFR 735.404a, the following categories of financial interest are determined to be too remote or too inconsequential to affect the integrity of an employee's services in any matter in which he may act in his governmental capacity, and need not be reported under this section:

(1) Any holding in a widely held mutual fund or regulated investment company.

(2) Ownership of bonds other than corporate bonds.

(3) Any deposit account in a federally insured bank, savings and loan association, or credit union.

(4) Any life or other insurance policy.

§ 303.109 Statements of employment of special Government employees.

(a) Each special Government employee, other than a non-Government member of the Conference, shall at the time of his employment submit a statement of all other employment and of such other financial information, as described in section 306 of the Executive order, as the Executive Director determines is relevant in the light of the duties the employee is to perform: *Provided*, That financial interests listed in § 303.108(c) need not be reported. The statement shall be kept current throughout the period of the employee's service.

(b) Each non-Government member of the Administrative Conference shall submit a statement of all other employment upon appointment to the Conference. A statement of other financial information as described in section 306 of the Executive order, shall not be required, unless the Chairman determines that such additional information is relevant in the light of the duties the member is to perform. Statements filed by non-Government members shall be reviewed by the Chairman who shall take appropriate action to resolve any indicated conflict statements of financial interests. Statements shall be kept current throughout the period of the member's service. The provisions of §§ 303.103 and 303.104 of this regula-

tion are not applicable to non-Government members of the Conference.

PART 304—PUBLIC AVAILABILITY OF DOCUMENTS AND RECORDS

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Subpart A—Freedom of Information Act Implementation

AUTHORITY: 5 U.S.C. 552, 571-576.

SOURCE: 40 FR 10442, Mar. 6, 1975, unless otherwise noted.

§ 304.1 General.

This part implements section 552 of Title 5, United States Code, and prescribes rules governing the availability to the public of documents and records of the Administrative Conference of the United States.

§ 304.2 Publications.

(a) Recommendations and Statements of the Administrative Conference are published, upon adoption by the Assembly, in the **FEDERAL REGISTER**, together with the full texts of any separate statements filed pursuant to section 575(a)(1) of the Administrative Conference Act, 5 U.S.C. 575(a)(1). Complete lists of Recommendations and Statements, together with the texts of those Recommendations and Statements deemed to be of continu-

ing general interest, are published in Parts 305 and 310 of this chapter.

(b) The Annual Report of the Administrative Conference contains the texts of all Recommendations and Statements of the Conference adopted during the preceding year, together with the full texts of any separate statements. It also contains descriptive material regarding the work of the Conference and its committees. The Annual Report is available from the Superintendent of Documents. Single copies of current and past Annual Reports will also be furnished by the Conference on request, to the extent that supplies on hand permit.

(c) The staff or consultant reports that form the basis for Conference Recommendations and Statements are collected and published from time to time in bound volumes under the title Recommendations and Reports of the Administrative Conference of the United States. These volumes are available from the Superintendent of Documents.

(d) The Conference endeavors to maintain for distribution to interested persons an adequate stock of final consultant and staff reports, copies of congressional testimony, membership lists, newsletters, minutes of recent committee meetings, and other documents of general interest. Requests for single copies of such documents will be filled at no charge to the extent that supplies on hand permit.

§ 304.3 Requests for records.

(a) It is the policy of the Administrative Conference to make records and documents in its possession available to the public to the greatest extent possible. All records of the Conference are available for public inspection and copying in accordance with this section except those records or portions of records as to which the Executive Secretary or his designee specifically determines that:

(1) They fall within a particular exemption in section 552(b) of the Freedom of Information Act and

(2) Disclosure would not be consistent with the national interest, the protection of private rights or the efficient conduct of Conference business.

(b) A request for records, other than for documents which are published in the FEDERAL REGISTER or available for sale or distribution as described in § 304.2 of this part, shall be made in writing and directed to the Executive Secretary, Administrative Conference of the United States, 2120 L Street NW., Washington, D.C. 20037. Such request shall be clearly marked "Freedom of Information Request" or "Information Request" and shall reasonably describe the record requested. The staff of the Administrative Conference will make reasonable efforts to assist a requester in formulating his request. Nothing in this section shall preclude staff of the Administrative Conference from complying with oral, unmarked, or generally stated requests for information and documents.

(c) The Executive Secretary or his designee shall, within ten working days after its receipt, either comply with or deny a request for records, provided that when additional time is required because of:

(1) A need to search for, collect and examine a voluminous amount of separate and distinct records demanded in a single request, or (2) a need for consultation with another agency having a substantial interest in the determination of the request, the time limit for disposing of the request may be extended for up to ten additional working days by a written notice to the requester setting forth the reasons for and the anticipated length of the delay.

(d)(1) Where it appears to the Executive Secretary or his designee that fees chargeable under § 304.6 of this regulation for compliance with the request will exceed \$25, and the requester has not indicated in advance his willingness to pay fees as high as are anticipated, the requester shall be promptly notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In such cases, a request will not be deemed to have been received until the requester is notified of the anticipated cost and agrees to bear it. The notification shall offer the requester the opportunity to confer with Conference personnel with the object of re-

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formulating the request so as to meet his needs at lower cost.

(2) Where the anticipated fee chargeable under this part exceeds \$50, an advance deposit of 25% of the anticipated fee or \$25, whichever is greater, may be required. Where a requester has previously failed to pay a fee under this part, an advance deposit of the full amount of the anticipated fee may be required.

(e) The requester will be notified promptly of the determination made pursuant to paragraph (c) of this section. If the determination is to release the requested record, such record shall promptly be made available. If the determination is not to release the record, the person making the request shall, at the same time he is notified of such determination, be notified of:

(1) The reason for the determination;

(2) The name and title or position of each person responsible for the denial of the request; and

(3) His right to seek judicial review of such determination pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. 552(a)(4).

§ 304.4 Index.

The Freedom of Information Act, 5 U.S.C. 552(a)(2), requires each agency to maintain and make available for public inspection and copying a current index of certain materials issued, adopted or promulgated by the agency. With respect to the materials covered by section 552(a)(2)(B), the Conference maintains currently for distribution and publishes in the Code of Federal Regulations a complete list of Conference Recommendations and Statements. See § 304.2(a) of this part. The Conference has no adjudicatory responsibilities of the kind contemplated by section 552(a)(2)(A) of the Act and does not ordinarily issue materials of the type described in section 552(a)(2)(C). Should such materials be issued, appropriate indexes will be maintained.

§ 304.5 Policy with respect to requests for particular kinds of documents.

This section is intended to amplify the policy set out in § 304.3(a) as ap-

plied to specific categories of documents:

(a) All materials which are distributed to the membership of the Administrative Conference for consideration at a plenary session will upon distribution be available to the public in accordance with § 304.2(d) of these regulations.

(b) Consultant and staff reports which are otherwise exempt from disclosure under the Freedom of Information Act as interagency or intra-agency correspondence will, absent special circumstances, be made available if the reports are in substantially completed form and have been distributed widely for comment within or outside the Government. Tentative reports and working drafts which have received only limited circulation will ordinarily not be made available.

(c) Agency comments on a report or proposed recommendation, if exempt from disclosure under the Freedom of Information Act, will nevertheless ordinarily be made available unless the agency indicates to the Conference that its comment is confidential. Comment of an individual Conference member, writing in his personal capacity, will not be made available without the consent of the member.

(d) The following categories of documents are declared to be available to the public, notwithstanding any applicable exemption in section 552(b) of the Freedom of Information Act:

(1) Agency reports on the implementation of Conference recommendations;

(2) Correspondence from the Office of the Chairman of the Administrative Conference to committees of Congress, commenting on pending legislation;

(3) Minutes of meetings of the standing committees of the Conference;

(4) Transcripts of plenary sessions of the Conference.

§ 304.6 Schedules of fees.

The Executive Secretary may charge a fee for searching for and copying documents or records requested pursuant to § 304.3, as follows:

(a) The fee for copies shall be \$0.10 per copy per page. Copying fees of less than \$2 per request are waived.

(b) The search charge shall be \$5 per hour for the services of nonprofessional personnel and \$9 per hour for the services of professional personnel. Search charges shall be calculated to the nearest quarter hour. There shall be no search charge for searches requiring less than one-half man hour.

(c) No fee will be charged in connection with any record which is not made available because it is found to be exempt from disclosure.

(d) Charges may be waived or reduced where the Executive Secretary determines that such waiver or reduction is in the public interest.

Subpart B—Privacy Act Implementation

AUTHORITY: 5 U.S.C. 552, 552a, 571-576.

SOURCE: 41 FR 15321, Apr. 12, 1976, unless otherwise noted.

§ 304.20 Purpose and scope.

The purpose of this subpart is the implementation of the Privacy Act of 1974, 5 U.S.C. 552a, by establishing procedures whereby an individual can determine if a system of records maintained by the Administrative Conference contains a record pertaining to himself, and procedures for providing access to such a record for the purpose of review, amendment, or correction. Requests for assistance in interpreting or complying with these regulations should be addressed to the Executive Secretary, Administrative Conference of the United States, 2120 L Street, NW., Suite 500, Washington, D.C. 20037.

§ 304.21 Definitions.

As used in this subpart, the terms "individual," "maintain," "record," "system of records," and "routine use" shall have the meaning specified in 5 U.S.C. 552a(a).

§ 304.22 Procedures for requests pertaining to individual records in a system of records.

(a) An individual can determine if a particular system of records main-

tained by the Administrative Conference contains a record pertaining to himself by submitting a written request for such information to the Executive Secretary. The Executive Secretary shall respond to a written request under this subpart within a reasonable time by stating that a record on the individual either is or is not contained in the system.

(b) If an individual seeks access to a record pertaining to himself in a system of records, he shall submit a written request to the Executive Secretary. The Executive Secretary or his designee shall, within ten working days after its receipt, acknowledge the request and if possible decide if it should be granted. In any event, a decision shall be reached promptly and notification thereof provided to the individual seeking access. If the request is denied, the individual shall be informed of the reasons therefor and his right to seek judicial review.

(c) In cases where an individual has been granted access to his records, the Executive Secretary may, prior to releasing such records, require the submission of a signed notarized statement verifying the identity of the individual to assure that such records are disclosed to the proper person. No verification of identity will be required when such records are available under the Freedom of Information Act, 5 U.S.C. 552, as amended.

§ 304.23 Request for amendment or correction of a record.

(a) An individual may file a request with the Executive Secretary for amendment or correction of a record pertaining to himself in a system of records. Such written request shall state the nature of the information in the record the individual believes to be inaccurate or incomplete, the amendment or correction desired and the reasons therefor. The individual should supply whatever information or documentation he can in support of his request for amendment or correction of a record.

(b) The Executive Secretary or his designee shall, within ten working days after its receipt, acknowledge a request for amendment or correction

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of a record. A decision shall be reached promptly and notification thereof provided to the individual seeking to amend or correct a record. The Executive Secretary may request such additional information or documentation as he may deem necessary to arrive at a decision upon the request. If the request is granted, the record as amended shall be called to the attention of all prior recipients of the individual's record.

(c) If the request is denied, the individual shall be informed of the reasons therefor and his right to appeal the denial in writing to the Chairman of the Conference. The Chairman shall render a decision on an appeal within thirty working days following the date on which the appeal is received. The individual shall be notified promptly of the Chairman's decision and, if the appeal is denied, the reasons therefor and the individual's right to seek judicial review and his right to file a concise statement of disagreement, which statement shall be noted in the records to which it pertains and supplied to all prior and subsequent recipients of the disputed record. If an appeal is granted, the record as amended shall be called to the attention of all prior recipients of the individual's record.

(d) Requests for amendment or correction of a record must be accompanied by a signed notarized statement verifying the identity of the requesting party.

§ 304.24 Disclosure of a record to a person other than the individual to whom it pertains.

Except in accordance with 5 U.S.C. 552a(b), or as required by the Freedom of Information Act, 5 U.S.C. 552, as amended, or other applicable statute, the Conference shall not disclose a record to any individual other than the individual to whom the record pertains without the written consent of such individual. An accounting of the date, nature, and purpose of each disclosure of a record as well as the name and address of the person or agency to whom the disclosure was made will be maintained. This accounting will be made available to the individual to whom the record pertains upon the

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submission of a written, notarized request to the Executive Secretary.

§ 304.25 Schedule of fees.

Copies of records supplied to any individual at his request shall be provided for \$.10 per copy per page. Copying fees of less than \$2 per request are waived.

PART 305—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Sec.

- 305.68-1 Adequate Hearing Facilities (Recommendation No. 68-1).
- 305.68-2 U.S. Government Organization Manual (Recommendation No. 68-2).
- 305.68-3 Parallel Table of Statutory Authorities and Rules (2 CFR Ch. I)¹ (Recommendation No. 68-3).
- 305.68-4 Consumer Bulletin (Recommendation No. 68-4).
- 305.68-5 Representation of the Poor in Agency Rulemaking of Direct Consequence to Them (Recommendation No. 68-5).
- 305.68-6 Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency (Recommendation No. 68-6).
- 305.68-7 Elimination of Jurisdictional Amount Requirement in Judicial Review (Recommendation No. 68-7).
- 305.68-8 Judicial Review of Interstate Commerce Commission Orders (Recommendation No. 68-8).
- 305.69-1 Statutory Reform of the Sovereign Immunity Doctrine (Recommendation No. 69-1).
- 305.69-2 Judicial Enforcement of Orders of the National Labor Relations Board (Recommendation No. 69-2).
- 305.69-3 Publication of a "Guide to Federal Reporting Requirements" (Recommendation No. 69-3).
- 305.69-4 Analytical Subject-Indexes to Selected Volumes of the Code of Federal Regulations (Recommendation No. 69-4).
- 305.69-5 Elimination of Duplicative Hearings in FAA Safety De-certification Cases (Recommendation No. 69-5).
- 305.69-6 Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies (Recommendation No. 69-6).

¹As of July 1, 1977, codified as Table I of the CFR Index and Finding Aids Volume.

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- 305.69-7 Consideration of Alternatives in Licensing Procedures (Recommendation No. 69-7).
- 305.69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69-8).
- 305.69-9 Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government (Recommendation No. 69-9).
- 305.70-1 Parties Defendant (Recommendation No. 70-1).
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- 305.70-3 Summary Decision in Agency Adjudication (Recommendation No. 70-3).
- 305.70-4 Discovery in Agency Adjudication (Recommendation No. 70-4).
- 305.70-5 Practices and Procedures Under the Renegotiation Act of 1951 (Recommendation No. 70-5).
- 305.71-1 Interlocutory Appeal Procedures (Recommendation No. 71-1).
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- 305.71-3 Articulation of Agency Policies (Recommendation No. 71-3).
- 305.71-4 Minimum Procedures for Agencies Administering Discretionary Grant Programs (Recommendation 71-4).
- 305.71-5 Procedure of the Immigration and Naturalization Service in Respect to Change-of-Status Applications (Recommendation No. 71-5).
- 305.71-6 Public Participation in Administrative Hearings (Recommendation No. 71-6).
- 305.71-7 Rulemaking on a Record by the Food and Drug Administration (Recommendation No. 71-7).
- 305.71-8 Modification and Dissolution of Orders and Injunctions (Recommendation No. 71-8).
- 305.71-9 Enforcement of Standards in Federal Grant-in-Aid Programs (Recommendation No. 71-9).
- 305.72-1 Broadcast of Agency Proceedings (Recommendation No. 72-1).
- 305.72-2 Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes (Recommendation No. 72-2).
- 305.72-3 Procedures of the United States Board of Parole (Recommendation No. 72-3).
- 305.72-4 Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies (Recommendation No. 72-4).

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- 305.72-5 Procedures for the Adoption of Rules of General Applicability (Recommendation No. 72-5).
- 305.72-6 Civil Money Penalties as a Sanction (Recommendation No. 72-6).
- 305.72-7 Pre-induction Review of Selective Service Classification Orders and Related Procedural Matters (Recommendation No. 72-7).
- 305.72-8 Adverse Actions Against Federal Employees (Recommendation No. 72-8).
- 305.73-1 Adverse Agency Publicity (Recommendation No. 73-1).
- 305.73-2 Labor Certification of Immigrant Aliens (Recommendation No. 73-2).
- 305.73-3 Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation (Recommendation No. 73-3).
- 305.73-4 Administration of the Antidumping Law by the Department of the Treasury (Recommendation No. 73-4).
- 305.73-5 Elimination of the "Military or Foreign Affairs Function" Exemption From APA Rulemaking Requirements (Recommendation No. 73-5).
- 305.73-6 Procedures for Resolution of Environmental Issues in Licensing Proceedings (Recommendation No. 73-6).
- 305.74-1 Subpena Power in Formal Rulemaking and Formal Adjudication (Recommendation No. 74-1).
- 305.74-2 Procedures for Discretionary Distribution of Federal Assistance (Recommendation No. 74-2).
- 305.74-3 Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands (Recommendation 74-3).
- 305.74-4 Preenforcement Judicial Review of Rules of General Applicability (Recommendation 74-4).
- 305.75-1 Licensing Decisions of the Federal Banking Agencies (Recommendation No. 75-1).
- 305.75-2 Affirmative Action for Equal Opportunity in Nonconstruction Employment (Recommendation No. 75-2).
- 305.75-3 The Choice of Forum for Judicial Review of Administrative Action (Recommendation No. 75-3).
- 305.75-4 Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards (Recommendation No. 75-4).
- 305.75-5 Internal Revenue Service Procedures: The Audit and Settlement Processes (Recommendation No. 75-5).
- 305.75-6 Internal Revenue Service Procedures: Collection of Delinquent Taxes (Recommendation No. 75-6).
- 305.75-7 Internal Revenue Service Procedures: Civil Penalties (Recommendation No. 75-7).

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- 305.75-8 Internal Revenue Service Procedures: Tax Return Confidentiality (Recommendation No. 75-8).
- 305.75-9 Internal Revenue Service Procedures: Taxpayer Services and Complaints (Recommendation No. 75-9).
- 305.75-10 Internal Revenue Service Procedures: The IRS Summons Power (Recommendation No. 75-10).
- 305.76-1 Exception from Mandatory Retirement for Certain Presidential Appointees (Recommendation No. 76-1).
- 305.76-2 Strengthening the Informational and Notice-Giving Functions of the "Federal Register" (Recommendation No. 76-2).
- 305.76-3 Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking (Recommendation No. 76-3).
- 305.76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4).
- 304.76-5 Interpretive Rules of General Applicability and Statements of General Policy (Recommendation 76-5).
- 305.77-1 Legislative Veto of Administrative Regulations (Recommendation No. 77-1).
- 305.77-2 Judicial Review of Customs Service Actions (Recommendation No. 77-2).
- 305.77-3 Ex parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3).
- 305.78-1 Reduction of Delay in Ratemaking Cases (Recommendation No. 78-1).
- 305.78-2 Procedures for Determining Social Security Disability Claims (Recommendation No. 78-2).
- 305.78-3 Time Limits on Agency Actions (Recommendation No. 78-3).
- 305.78-4 Federal agency interaction with private standard-setting organizations in health and safety regulation (Recommendation No. 78-4).
- 305.79-1 Hybrid Rulemaking Procedures of the Federal Trade Commission (Recommendation No. 79-1).
- 305.79-2 Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program (Recommendation No. 79-2).
- 305.79-3 Agency Assessment and Mitigation of Civil Money Penalties (Recommendation No. 79-3).
- 305.79-4 Public Disclosure Concerning the use of Cost-Benefit and Similar Analyses in Regulation (Recommendation No. 79-4).
- 305.79-5 Hybrid Rulemaking Procedures of the Federal Trade Commission—Administration of the Program to Reimburse Participants' Expenses (Recommendation No. 79-5).

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- 305.79-6 Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment (Recommendation No. 79-6).
- 305.79-7 Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency (Recommendation No. 79-7).
- 305.80-1 Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Recommendation No. 80-1).
- 305.80-2 Enforcement of Petroleum Price Regulations (Recommendation No. 80-2).
- 305.80-3 Interpretation and Implementation of the Federal Advisory Committee Act (Recommendation No. 80-3).
- 305.80-4 Decisional Officials' Participation in Rulemaking Proceedings (Recommendation No. 80-4).
- 305.80-5 Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action (Recommendation No. 80-5).
- 305.80-6 Intragovernmental Communications in Informal Rulemaking Proceedings (Recommendation No. 80-6).
- 305.81-1 Procedures for Assessing and Collecting Freedom of Information Act fees (Recommendation No. 81-1).
- 305.81-2 Current Versions of the Bumpers Amendment (Recommendation No. 81-2).
- 305.82-1 Exemption (b)(4) of the Freedom of Information Act (Recommendation No. 82-1).
- 305.82-2 Resolving Disputes Under Federal Grant Programs (Recommendation No. 82-2).
- 305.82-3 Federal Venue Provisions Applicable to Suits Against the Government (Recommendation No. 82-3).
- 305.82-4 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4).
- 305.82-5 Federal Regulation of Cancer-causing Chemicals (Recommendation No. 82-5).
- 305.82-6 Federal Officials' Liability for Constitutional Violations (Recommendation No. 82-6).
- 305.82-7 Judicial Review of Rules in Enforcement Proceedings (Recommendation No. 82-7).
- 305.83-1 The Certification Requirement in the Contract Disputes Act (Recommendation No. 83-1).
- 305.83-2 The "Good Cause" Exemption from APA Rulemaking Requirements (Recommendation No. 83-2).

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- 305.83-3 Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act (Recommendation No. 83-3).
- 305.83-4 The Use of the Freedom of Information Act for Discovery Purposes (Recommendation No. 83-4).
- 305.84-1 Public Regulation of Siting of Industrial Development Projects (Recommendation No. 84-1).
- 305.84-2 Procedures for Product Recalls (Recommendation No. 84-2).
- 305.84-3 Improvements in the Administration of the Government in the Sunshine Act (Recommendation No. 84-3).
- 305.84-4 Negotiated Cleanup of Hazardous Waste Sites Under CERCLA (Recommendation No. 84-4).
- 305.84-5 Preemption of State Regulation by Federal Agencies (Recommendation No. 84-5).
- 305.84-6 Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings (Recommendation No. 84-6).
- 305.84-7 Administrative Settlement of Tort and Other Monetary Claims Against the Government (Recommendation No. 84-7).
- 305.85-1 Legislative preclusion of cost/benefit analysis (Recommendation No. 85-1).
- 305.85-2 Agency procedures for performing regulatory analysis of rules (Recommendation No. 85-2).
- 305.85-3 Coordination of public and private enforcement of environmental laws (Recommendation No. 85-3).
- 305.85-4 Administrative Review in Immigration Proceedings (Recommendation No. 85-4).
- 305.85-5 Procedures for Negotiating Proposed Regulations (Recommendation No. 85-5).

AUTHORITY: 5 U.S.C. 571-576.

SOURCE: 38 FR 19782, July 23, 1973, unless otherwise noted.

EDITORIAL NOTE: For an explanation of the publication policy regarding these recommendations, see § 304.2(a) of this chapter.

§ 305.68-1 Adequate Hearing Facilities (Recommendation No. 68-1).

Administrative hearings of the Federal Government should be conducted in dignified, efficient hearing rooms, appropriate as to size, arrangement, and furnishings. At the present time no central body is responsible for providing or planning the needed facilities. As a particular consequence, administrative hearings often have been conducted in surroundings unsuitable to the seriousness of these governmental proceedings.

The General Services Administration could advantageously arrange for the service and the space needed by departments and agencies in which administrative hearings occur.

RECOMMENDATION

1. The General Services Administration should develop a set of four hearing room classifications explicitly identifying the features required with standards meeting at least the following minimum requirements. Such classifications should be developed in conjunction with representatives of the agencies, the bar, and examiners. The minimum requirements should be:

Type A—A formal conference room with table space for as many as 16 principals and additional seating for up to 20 other persons.

Type B—A small hearing room with a raised dais, a witness box, a reporter's table, table space for as many as six counsel, and additional seating for up to 30 others. The design and furnishings should be appropriate to a hearing which is judicial in nature and should include wherever possible an auxiliary room in which counsel may confer with their clients, witnesses may be sequestered, etc.

Type C—A large hearing room accommodating as many as 30 counsel at tables and up to 70 witnesses and spectators. This room should have the design and furnishings which are appropriate to formal hearings of a judicial nature.

Type D—An auditorium suitable for hearings of general public interest which might attract over 100 principals and spectators.

An essential requirement of each of the four types of hearing rooms should be a small, nearby room available to the examiner as his office and for such other uses as he designates.

2. The General Services Administration should prepare and maintain on a current basis an inventory which (a) identifies available hearing facilities throughout the country, classified under the system recommended in 1 above, including hearing rooms permanently assigned to particular agencies as well as courtrooms (local, State, and Federal), (b) identifies the GSA regional offices, local building managers,

and others through whom such space can be obtained, and (c) provides information concerning the procedures to be followed to obtain space through the GSA for the conduct of hearings.

3. The General Services Administration should establish procedures for determining the frequency and location of administrative hearings which require facilities of each type within the system of classification recommended above in order to determine, by city, whether a permanent hearing room for multiagency use can be justified. A permanent hearing room should be considered justified wherever there is a continuing need of approximately one-fourth of the available working days.

4. The General Services Administration should provide for the administration and scheduling of permanent multiagency hearing facilities under the direction of GSA's Washington headquarters, but subject to such decentralization as the functions of inventorying, procuring, and planning may require.

5. The General Services Administration should establish a procedure for the systematic reporting, to the respective agency and to GSA, of deficiencies in assigned facilities discovered by presiding officers, and for the investigation and correction of such deficiencies.

6. The General Services Administration should establish an advisory committee of members of the bar and other interested professional, associations, agency representatives, and members of the public to facilitate the evaluation of present and future needs and to report annually to the Administrative Conference on its activities.

7. Permanent multiagency hearing rooms and hearing rooms permanently assigned to individual Federal agencies should be identified as "Federal Administrative Hearing Rooms."

8. The Chairman of the Administrative Conference should encourage the cooperation of State and local judges in the procurement of courtroom space for Federal administrative hearings.

9. The Judicial Conference of the United States should encourage the cooperation of Federal judges in the

procurement of courtroom space for Federal administrative hearings.

10. Federal agencies should budget funds to provide for the payment of charges for the use of appropriate space when such space is not available on a free basis.

11. Federal agencies which conduct administrative hearings should designate an official to work with the General Services Administration in the procurement and planning of hearing facilities.

§ 305.68-2 U.S. Government Organization Manual (Recommendation No. 68-2).

§ 305.68-3 Parallel Table of Statutory Authorities and Rules (2 CFR Ch. I)¹ (Recommendation No. 68-3).

§ 305.68-4 Consumer Bulletin (Recommendation No. 68-4).

§ 305.68-5 Representation of the Poor in Agency Rulemaking of Direct Consequence to Them (Recommendation No. 68-5).

RECOMMENDATION

A. Agency efforts. 1. Federal agencies should engage more extensively in affirmative, self-initiated efforts to ascertain directly from the poor their views with respect to rulemaking that may affect them substantially. For this purpose, agencies should make strong efforts, by use of existing as well as newly devised procedures, to obtain information and opinion from those whose circumstances may not permit conventional participation in rulemaking proceedings. The "rulemaking" referred to is that defined by the Administrative Procedure Act, section 2(c), 5 U.S.C. 551 (4) and (5).

2. Agencies should employ as many of the following procedures as are feasible, practicable, and necessary to assure their being fully informed concerning the relevant interests of the poor:

(a) Agencies should seek to inform the poor of all rulemaking proposals that may affect them substantially and should provide opportunities for

¹As of July 1, 1977, codified as Table I of the CFR Index and Finding Aids Volume.

the poor to submit their views concerning these and related proposals.

(b) Agencies should hold formal public hearings or informal conferences in close geographic proximity to the poor substantially affected by contemplated rulemaking.

(c) Agencies should take care to invite individuals constituting a representative cross-section of the poor to submit their views orally or in writing as to proposed rules substantially affecting the poor.

(d) Agencies should conduct field surveys among the poor to discover their attitudes concerning particular government policymaking substantially affecting them.

(e) Agencies should use advisory committees made of representatives of the poor as continuing consultants for all programs having a substantial effect on such persons.

(f) When necessary to assure adequate representation for the poor, agencies should pay the personal expenses and losses incurred by individuals incident to their participation in rulemaking hearings. Congress should support agency requests for funds and for authority, where none exists, to make discretionary payments for this purpose. Agencies already authorized to make such payments in whole or in part should use their existing authority and should allocate funds accordingly.

In deciding whether the use of any one or more of the above devices is feasible, practicable, or necessary in a given situation, agencies should resolve doubts in favor of utilizing them; but their enumeration should not exclude or discourage the development and use of other devices to achieve the same result.

In carrying out paragraphs 1 and 2 of this recommendation, agencies should consult with and coordinate their efforts with other Federal agencies having responsibilities in this area and should make maximum feasible use of the facilities of such other agencies for communicating with and obtaining expressions of the views of the poor.

3. Agencies should be encouraged in appropriate circumstances to determine that the exemptions in 5 U.S.C.

553(a)(2) should not be applied with respect to rulemaking which may have a substantial impact on the poor.

B. People's Counsel. 4. (a) An organization should be authorized by statute to employ a staff to act as "People's Counsel." The People's Counsel should represent the interests of the poor in all Federal administrative rulemaking substantially affecting the poor.

(b) The People's Counsel should be charged with assuring that the views of significant separable minority interests among the poor are represented in such Federal administrative rulemaking.

(c) The People's Counsel should be required to disseminate to all interested poor people's organizations pertinent information concerning rulemaking substantially affecting the poor.

(d) The People's Counsel should be authorized to participate suitably in its own name to represent the interests of the poor in any Federal agency proceedings in which the poor have a substantial interest.

(e) The People's Counsel should be authorized to provide representation for organizations and groups of the poor who seek judicial review of administrative action substantially affecting their interests. This recommendation is not to alter the kinds of agency action amenable to judicial review, the requirements of standing to seek review, or the scope of that review.

(f) As an incident to its main responsibilities the People's Counsel should be empowered to recommend to Congress or the President or to both such legislation or other action as it deems appropriate to correct deficiencies in or otherwise improve Federal programs having a substantial impact on the poor.

5. (a) Congress should provide for an appropriate body to perform the functions outlined in section 4. Deserving of consideration as such body would be a new single-purpose corporation, to be created by Congress, modeled on the Corporation for Public Broadcasting, Pub. L. 90-129, 81 Stat. 368 (1967), 47 U.S.C. (Supp. III) 396, and to be known as the People's Counsel Corporation. In the event this form of orga-

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nization is adopted, the following considerations should apply:

(1) The People's Counsel Corporation should be made tax exempt and authorized to accept grants of private funds. Gifts to the Corporation should be made deductible as charitable contributions for Federal income tax purposes.

(2) Federal financing of the Corporation should be made available to the extent necessary to assure its effective operation.

(3) The governing board of the People's Counsel Corporation should be constituted to give the poor meaningful representation thereon. Such body should be constituted to ensure close communication with the poor and effective representation of the viewpoints of the poor.

6. All Federal agencies should be required by Executive order to notify the People's Counsel of all proposed rules which would have a substantial impact on the poor. Agencies also should be required by that Executive order to give the People's Counsel an opportunity to present the views of the poor with respect to such proposed rules. Exceptions to these obligations should be permitted only "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that (such) notice and . . . (an opportunity for the People's Counsel to present its views) are impracticable, unnecessary, or contrary to the public interest." (See 5 U.S.C. 553(b)(B).) In these exceptional cases, agencies should be required to notify the People's Counsel as soon as practicable of any consummated rulemaking substantially affecting the poor, and should be required to give the Counsel as soon as practicable an opportunity to communicate to the agency its views concerning the desirability of further action with respect to such rulemaking.

Without prejudice to creating or empowering any other appropriate body to perform the general functions outlined in paragraphs 4, 5, and 6, any special provision therefor should be so structured as to take maximum advantage of the capabilities in this field of nongovernment organizations, and of

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other public bodies, including notably the Office of Economic Opportunity.

EDITORIAL NOTE: Six separate statements were filed concerning this Recommendation.

§ 305.68-6 Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency (Recommendation No. 68-6).

RECOMMENDATION

1. In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.

2. Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, should be amended as necessary to clarify the authority of agencies to restructure their decisional processes along either of the following lines:

(a) *Intermediate appellate boards.*

(1) Whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by rule or order:

(A) Establish one or more intermediate appellate boards consisting of agency employees qualified by training, experience, and competence to perform review functions,

(B) Authorize these boards to perform functions in connection with the disposition of cases of the same character as those which may be performed by the agency,

(C) Prescribe procedures for review of subordinate decisions by such boards or by the agency, and

(D) Restrict the scope of inquiry by such boards and by the agency in any review, without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion

as fully as if it were making the initial decision.

(2) Any order or decision of an intermediate appellate board, unless reviewed by the agency, shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as orders and decisions of the agency.

(3) A party aggrieved by an order of such board may file an application for review by the agency within such time and in such manner as the agency shall prescribe, and every such application shall be passed upon by the agency.

(4) In passing upon such applications for review, an agency may grant, in whole or in part, or deny the application without specifying any reasons therefor. No such application shall rely upon questions of fact or law upon which the intermediate appellate board has been afforded no opportunity to pass.

(5) An agency, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or other action made or taken by an intermediate appellate board.

(6) If an agency grants an application for review or undertakes review on its own motion, it may affirm, modify, reverse, or set aside the order, decision, report or other action of the intermediate appellate board, or may remand the proceeding for reconsideration.

(7) The filing of an application for agency review shall be a condition precedent to judicial review of any order of an intermediate appellate board.

(8) Agency employees performing review functions shall not be responsible to or subject to the supervision or direction of any employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

(b) *Discretionary review of decisions of presiding officers.* (1) When a party to a proceeding seeks administrative review of an initial decision rendered by the presiding officer (or other officer authorized by law to make such decision), the agency may accord administrative finality to the initial decision

by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes a reasonable showing that:

(A) Prejudicial procedural error was committed in the conduct of the proceeding, or

(B) The initial decision embodies

(i) A finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide,

(ii) A legal conclusion which is erroneous, or

(iii) An exercise of discretion or decision of law or policy which is important and which the agency should review.

(2) The agency's decision to accord or not to accord administrative finality to an initial decision shall not be subject to judicial review. If the initial decision becomes the decision of the agency, however, because it is summarily affirmed by the agency or because the petition for its review is denied, such decision of the agency will be subject to judicial review in accordance with established law.

§ 305.68-7 Elimination of Jurisdictional Amount Requirement in Judicial Review (Recommendation No. 68-7).

EDITORIAL NOTE: This recommendation has been implemented by Pub. L. 94-574.

§ 305.68-8 Judicial Review of Interstate Commerce Commission Orders (Recommendation 68-8).

EDITORIAL NOTE: This recommendation has been implemented by Pub. L. 93-584.

§ 305.69-1 Statutory Reform of the Sovereign Immunity Doctrine (Recommendation 69-1).

EDITORIAL NOTE: This recommendation has been implemented by Pub. L. 94-574.

§ 305.69-2 Judicial Enforcement of Orders of the National Labor Relations Board (Recommendation 69-2).

The orders of most major independent regulatory agencies normally become enforceable automatically unless challenged in court. The statutory requirement that an order of the NLRB can be made effective only by

affirmative action to obtain judicial confirmation of its terms, even when its validity is wholly uncontested, is contrary to efficient law enforcement. The Administrative Conference of 1961-62 urged that NLRB orders be treated, for purposes of judicial review, like those of the other major independent administrative agencies. That recommendation remains as sound today as when it was first made. The present practice burdens the courts with unnecessary proceedings whose only product is delay rather than added protection against ill-founded action. In the absence of any challenge after due notice to the parties, NLRB orders should be enforceable by the U.S. Courts of Appeals without further intermediate steps.

§ 305.69-3 Publication of a "Guide to Federal Reporting Requirements" (Recommendation No. 69-3).

§ 305.69-4 Analytical Subject-Indexes to Selected Volumes of the Code of Federal Regulations (Recommendation No. 69-4).

§ 305.69-5 Elimination of Duplicative Hearings in FAA Safety De-certification Cases (Recommendation No. 69-5).

§ 305.69-6 Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies (Recommendation No. 69-6).

Government agencies which conduct formal or informal rulemaking proceedings or cases of adjudication which directly fix the rights and obligations of private persons (hereafter referred to as "proceedings")¹ owe a special duty to the individuals affected and to the general public to manage their caseloads as efficiently as possible, to eliminate inordinate delays in the conduct of proceedings, and to work continuously toward improving the fairness, effectiveness, and economy of their procedures. The present volume of Federal administrative

¹The agency compilations proposed by this recommendation should not be limited to formal proceedings, or limited to "proceedings" as that term has been employed in gathering statistics for past conferences or Congressional groups. Rather, agency figures should report all matters directly fixing the rights, privileges, and obligations of private interests including the routine handling of applications and claims.

proceedings is so great that much of the basic information needed in these efforts can be developed in intelligible and useful form only through statistical study. The compilation and publication of comprehensive statistics on Federal agency proceedings, at regular intervals would:

(a) Provide each agency with information concerning its business which would enable it to manage its caseload more effectively.

(b) Augment generally the information concerning its activities which each agency must furnish to the President, the Congress, and the public.

(c) Afford affected parties and their counsel a better understanding of the administrative processes which determine their rights and obligations, and

(d) Provide a basis for specific study of particular agency procedures by the agency itself, by committees of Congress, the Administrative Conference of the United States, the organized bar, research scholars, and other individuals and organizations, public and private, interested in improving the Federal administrative process.

RECOMMENDATION

1. To the extent deemed useful to advance the purposes of this recommendation, each Federal administrative agency which conducts proceedings (as defined above) affecting private persons' rights, privileges or obligations, should prepare annual statistical data pertaining to those proceedings, to be compiled in such manner and presented in such publications as the agency considers appropriate.

2. These statistical compilations should list the kinds of proceedings pending during the year, with a concise yet meaningful description of the nature and purpose of each kind of proceeding and citations for the statutory authority under which the proceedings are conducted, and the sections of the Code of Federal Regulations which set forth the rules of practice governing each kind of proceeding.

3. For the purpose of agency efforts that may be made in cooperation with the Chairman of the Administrative Conference of the United States, to lessen delays in administrative proceedings, the statistical compilation should show the number of days which elapsed during each significant step of the proceedings which were concluded during the year.

4. In designing each agency's compilation, the following information, together with the time-study data referred to in 3 above, should be considered minimal:

(a) The number of proceedings of each kind pending at the beginning of the year;

(b) The number of new proceedings filed or otherwise commenced during the year;

(c) The number of proceedings concluded during the year and the manner of their disposition (i.e., by settlement, dismissal on procedural grounds, decision on the merits without hearing, final decision by agency after hearing, and an examiner's initial decision, etc.);

(d) The number of proceedings remaining at the end of the year; and

(e) The number of proceedings concluded during the year which were appealed to the courts.

5. Each agency should periodically analyse all of the information thus compiled and should develop improved techniques fitted to its particular needs to reduce delays and expense and otherwise to improve its administrative processes. A copy of this analysis should be submitted to the Administrative Conference of the United States.

6. In presenting its statistical compilation, each agency should summarize this analysis and describe the specific steps it has taken toward the ends referred to in 5 above.

7. Each agency, in its subsequent compilations, should follow a pattern that makes possible a comparison of data with corresponding data for earlier periods, thus reflecting changes in backlogs, volumes, and elapsed times and providing a measure of the agency's experience following the specific actions referred to in 6 above.

§ 305.69-8 Elimination of Certain Exemptions from the APA Rulemaking Requirements (Recommendation No. 69-8).

RECOMMENDATION

In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking procedures. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon non-governmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas.

Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the FEDERAL REGISTER, as to an entire subject matter concerning which rules may be promulgated. Each finding of this type should be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so.

§ 305.69-7 Consideration of Alternatives in Licensing Procedures (Recommendation No. 69-7).

EDITORIAL NOTE: This recommendation has been largely implemented by sec. 102 of the National Environmental Policy Act, Pub. L. 91-190.

§ 305.69-9 Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government (Recommendation No. 69-9).

RECOMMENDATION

A. RECRUITMENT AND SELECTION OF HEARING EXAMINERS

1. The Civil Service Commission should enlarge the base of recruitment and the number of qualified candidates available for appointment to hearing examiner positions by recognizing trial experience as one basis for qualification.

2. The Civil Service Commission should depart experimentally from the selective certification system as now practiced in the appointment of hearing examiners. Instead, it should develop a system under which the number of candidates qualified for hearing examiner positions is enlarged through the use of a general register for all agencies, with additional credit for specific relevant professional experience or selective certification for those agencies which demonstrate to the Civil Service Commission's satisfaction a current need for personnel possessing a specific background. The purpose of this experiment should be to permit meaningful comparative evaluation with the system now in effect. A report should be made to the Administrative Conference after 3 years of experience.

To aid the Civil Service Commission in effectuating the objective of this part of the recommendation, the Chairman of the Administrative Conference should appoint special committees from time to time to evaluate the standards of specific relevant professional experience proposed to the Civil Service Commission by any agency as being required for its work. Present selective certification agreements should continue until new standards have been adopted by the Civil Service Commission.

3. The Civil Service Commission should study and, if practicable, should institute an experimental intern program to supplement the

direct appointment of hearing examiners from the register. Without finally deciding the issue, the Conference urges the Commission to consider anew whether successful interns should automatically be placed in hearing examiner positions.

4. The Veterans Preference Act should be amended to permit the selection of examiners for each vacancy from the top 10 available persons then appearing on the register, determined on the basis of examination and ranking without reference to veterans preference.

B. CONTINUING TRAINING FOR GOVERNMENT ATTORNEYS AND EXAMINERS

1. Agencies employing attorneys and hearing examiners should encourage their participation in programs of continuing legal education. Budgets should include adequate funds for personnel so that attorneys and examiners may be released for reasonable periods of time to accomplish added training. Agencies should take all suitable steps to assure wide knowledge of training opportunities.

2. Agencies should also explore ways in which they can support the professional training activities of the Federal Trial Examiners Conference, bar associations, foundations, the Civil Service Commission, law schools, the individual agencies with parallel legal interests, and other institutions offering appropriate training for attorneys and examiners.

3. The feasibility of short-term exchange assignments of experienced attorneys in higher grades among agencies should be considered, in order to enhance the insight and effectiveness of government lawyers by exposing them to varied aspects of legal problems with which they may deal.

C. CREATION OF A CENTER FOR CONTINUING LEGAL EDUCATION IN GOVERNMENT

1. A center should be established in the Washington area for the continuing legal education of Government lawyers, hearing examiners, and private attorneys practicing before Government agencies. The center should also promote coordinated programs within the Government and with spe-

cialized segments of the organized bar; stimulate and engage in the preparation of manuals, research materials, and other publications in support of such continuing legal education; and provide a mechanism for the exchange of information concerning professional problems of Government attorneys. The center, under the direction of lawyers, should be oriented toward applied legal problems. The Civil Service Commission should make available to it the benefit of the Commission's experience in establishing and operating Federal Executive Institutes and centers. The Federal Administrative Justice Center proposed by the American Bar Association in a resolution adopted by the American Bar Association's House of Delegates in January 1969, as an example, would serve the purpose of the present recommendation.

2. The establishment of the Center should not diminish each agency's present responsibility to provide continuing legal education for its own lawyers through "in-house" training programs, but the Center should support and assist all agencies in maintaining these programs at a high level of effectiveness.

§ 305.70-1 Parties Defendant (Recommendation No. 70-1).

EDITORIAL NOTE: This recommendation has been implemented by Pub. L. 94-574.

§ 305.70-2 SEC No-Action Letters Under Section 4 of the Securities Act of 1933 (Recommendation No. 70-2).

§ 305.70-3 Summary Decision in Agency Adjudication (Recommendation No. 70-3).

Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists. Each agency having a substantial caseload of formal adjudications should adopt procedures providing for summary judgment or decision, patterned after the following model rule in suitable cases and with appropriate modifications to meet the needs of its own hearings:

RECOMMENDATION

SECTION 1. Any party to an adjudicatory or rulemaking proceeding required by statute to be determined on the record after opportunity for

agency hearing may, after commencement of the proceeding and at least — days before the date fixed for the hearing, move with or without supporting affidavits for a summary decision in his favor of all or any part of the proceeding. Any other party may, within — days after service of the motion, serve opposing affidavits or countermove for summary decision. The presiding officer may, in his discretion, set the matter for argument and call for the submission of briefs.

SEC. 2. The presiding officer may grant such motion if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

SEC. 3. Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for the hearing.

SEC. 4. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the presiding officer may deny the motion for summary decision or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

SEC. 5. The denial of all or any part of a motion for summary decision by the presiding officer shall not be subject to interlocutory appeal to the (review authority) unless (a) the presiding officer certifies in writing (i) that the ruling involves an important question of law or policy as to which there is substantial ground for difference of opinion and (ii) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; or (b) if the presiding officer declines so to certify, a

designee of the (*review authority*) so certifies upon appropriate application. The allowance of such an interlocutory appeal shall not stay the proceeding before the presiding officer unless the (*review authority*) shall so order.

§ 305.70-4 Discovery in Agency Adjudication (Recommendation No. 70-4).

Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

RECOMMENDATION

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations.

The recommended minimum standards include the following procedures:

1. *Prehearing conferences.* The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the

issues are complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, their evidentiary exhibits and witness lists.

2. *Depositions.* A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) The taking of depositions should normally be deferred until there has been at least one prehearing conference;

(2) The party seeking to take a deposition should apply to the presiding officer for an order to do so;

(3) The party seeking to take a deposition should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) The presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) The presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) The deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency. An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum.

3. *Witnesses—(a) Prior statements.* At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee

appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other Federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government.

(b) *Narrative summaries of expected testimony.* At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under 3(a) above as all or part of the narrative summary of that witness' expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

4. *Written interrogatories to parties—(a) Availability.* A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories, should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be

stated in lieu of an answer. The party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

(b) *Interrogatories directed to the Agency.* Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.

5. *Requests for admissions—(a) Availability.* A party to the proceeding should be able to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

(b) *Requests directed to the Agency.* Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to requests for admissions served upon the agency. Requests directed to the agency which seek ad-

missions obtainable only from the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

6. *Production of documents and tangible things*—(a) *From non-parties*. A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

(b) *From parties*. A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection, copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

(c) *From the Agency*. For the purposes of paragraph 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding.

7. *Role of the Presiding Officer*—(a) *Control over discovery*. The presiding officer should have the authority to impose schedules on the parties to the proceeding specifying the periods of time during which the parties may pursue each means of discovery available to them under the rules of the agency. Such schedules and time periods should be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

(b) *Interlocutory appeals*. Except as provided by 2(6) above, an interlocutory appeal from a ruling of the presiding officer on discovery should be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time by the appropriate review authority. Notwithstanding the presiding officer's certification, the review authority should have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal should not result in a stay of the proceedings except in extraordinary circumstances.

8. *Protective Orders*—(a) *Authority of Presiding Officer in General*. The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(b) *Names of witnesses*. The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order: (a) To restrict or defer disclosure by a party of the name of a wit-

ness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. Any party affected by any such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.

(c) *In Camera* proceedings. The presiding officer should have the authority to permit a party or person seeking a protective order to make all or part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

9. *Subpoenas*. The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by this Recommendation that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.

§ 305.70-5 Practices and Procedures Under the Renegotiation Act of 1951 (Recommendation No. 70-5).

EDITORIAL NOTE: The Renegotiation Act has expired; see Pub. L. 94-431, 92 Stat. 1043.

§ 305.71-1 Interlocutory Appeal Procedures (Recommendation No. 71-1).

Interlocutory appeal procedures for agency review of rulings by presiding officers must balance the advantages derived from intermediate correction of an erroneous ruling against interruption of the hearing process and other costs of piecemeal review. Striking an appropriate balance between these competing concerns requires that the exercise of discretion in individual cases be carefully circumscribed. Procedures that delegate the responsibility for allowing interlocutory appeals to presiding officers, with a reserved power in the agency to

handle exceptional situations, have proven most satisfactory.

RECOMMENDATION¹

Each agency which handles a substantial volume of cases that are decided on the basis of a record should adopt interlocutory appeal procedures based on the following principles:

1. Presiding officers should be authorized to rule initially on all questions raised in the proceeding. A ruling by the presiding officer, supported by a reasoned statement, usually should precede interlocutory review of the question raised.

2. In general, interlocutory appeal from a ruling of the presiding officer should be allowed only when the presiding officer certifies that: (a) The ruling involves an important question of law or policy concerning which there is substantial ground for difference of opinion; and (b) an immediate appeal from the ruling will materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy.

3. Allowance of an interlocutory appeal should not stay the proceeding unless the presiding officer determines that extraordinary circumstances require a postponement. A stay of more than 30 days must be approved by the review authority.

4. If the number of interlocutory appeals in an agency is substantial, the authority to affirm, modify, or reverse the presiding officer's interlocutory ruling should be delegated, to the extent permitted by law, to a review authority designated by the agency.

5. Unless the review authority orders otherwise in the particular case, the review authority should decide the interlocutory appeal on the record and briefs submitted to the presiding officer without further briefs or oral argument. The review authority should summarily dismiss an interlocutory appeal whenever it determines that the presiding officer's certification was improvidently granted or that consid-

¹This recommendation supersedes section 5 of Recommendation No. 70-3 and paragraphs 2(6) and 7(b) of Recommendation No. 70-4, adopted June 2-3, 1970, insofar as they deal with interlocutory appeals.

eration of the appeal is unnecessary. If the review authority does not specify otherwise within 30 days after the certification or allowance of the interlocutory appeal, leave to appeal from the presiding officer's interlocutory ruling should be deemed to be denied.

6. Interlocutory review by petition to the review authority without certification by the presiding officer should be restricted to exceptional situations in which: (a) Vital public or private interests might otherwise be seriously impaired, and (b) the review authority has not had an opportunity to develop standards which the presiding officer can apply in determining whether interlocutory review is appropriate.

§ 305.71-2 Principles and Guidelines for Implementation of the Freedom of Information Act (Recommendation No. 71-2).

EDITORIAL NOTE: This recommendation has been largely implemented by Pub. L. 93-502.

§ 305.71-3 Articulation of Agency Policies (Recommendation No. 71-3).

Agencies of the Federal Government should strive to act on the basis of articulated policies and standards. Concerns of good government and efficient management support this general principle, as do the developing views of the Federal courts.

RECOMMENDATION

Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible. To this end, each agency which takes actions affecting substantial public or private interests, whether after hearing or through informal action, should, as far as is feasible in the circumstances, state the standards that will guide its determination in various types of agency action, either through published decisions, general rules or policy statements other than rules. Each such agency from time to time should review its precedents, rules and policy statements to assure that they accurately reflect the agency's developing experience. If rulemaking is used for these purposes, each agency should establish and publish general or particular procedures (whether or not such

procedures are required by statute) that define the extent and manner of public participation appropriate in the circumstances.

§ 305.71-4 Minimum Procedures for Agencies Administering Discretionary Grant Programs (Recommendation 71-4).

Agencies that administer grant programs employ disparate and sometimes inadequate procedures in notifying applicants of available funds, stating policies for award of grants, informing applicants of actions taken on applications, and other matters. Adoption of more uniform, minimum procedures would be helpful to the agencies and would assist applicants, who often must deal with a number of different agencies. The recommendation applies to all grant programs which involve the exercise of some discretion in their administration. It is not intended to apply to Federal grant-in-aid programs that are wholly mandatory, i.e., dispensed in accordance with a statutory formula without any discretion on the part of the agency.

RECOMMENDATION

Agencies should examine and revise their grant procedures to achieve to the maximum extent practicable the following objectives:

1. *Public notice.* Agencies should publish a notice in the **FEDERAL REGISTER** (or in other publications that, in the judgment of the agency, have wider distribution among potential grantees) of the availability of grant funds at the outset of a new grant program, each time additional funds become available, and each time a deadline is established for submission of applications for funds. When an agency elects to publish elsewhere than in the **FEDERAL REGISTER**, it should publish in the **FEDERAL REGISTER** a statement specifying the other publication or publications in which it will publish.

2. *Development of criteria by rulemaking.* Unless otherwise provided by statute, agencies should issue regulations, pursuant to the notice and opportunity to comment provisions of the Administrative Procedure Act (5 U.S.C. 553), specifying: (a) The procedures to be followed by applicants, and (b) criteria or standards, and priorities among criteria or standards, for the selection of grantees under each grant

program. Agencies should review and, when appropriate, reissue such regulations at least once every five years.

3. *Avoidance of conflict of interest.* Agencies should review their practices regarding utilization of advisory committees to ensure that they are in full compliance with existing conflict-of-interest requirements.

4. *Notification of applicants.* Agencies should notify applicants in writing of the award, rejection, modification, non-renewal or termination of grants, or the disallowance of expenditures under grants, specifying the grounds for such action. A more detailed statement of reasons should be made available upon request by the applicant.

5. *Public information.* Unless otherwise provided by statute and subject to the exemptions contained in the Freedom of Information Act, 5 U.S.C. 552(b), agencies should maintain and make available to public inspection the notifications specified in paragraph 4.

§ 305.71-5 Procedure of the Immigration and Naturalization Service in Respect to Change-of-Status Applications (Recommendation No. 71-5).

§ 305.71-6 Public Participation in Administrative Hearings (Recommendation No. 71-6).

Individuals and citizen organizations, often representing those without a direct economic or personal stake in the outcome, are increasingly seeking to participate in administrative hearings. Their concern is to protect interests and present views not otherwise adequately represented in the proceedings. Agencies are exposed to the views of their staffs, whose positions necessarily blend a number of interests, and to the views of those whose immediate stake is so great that they are willing to undertake the cost of vigorous presentation of their private interests. The opportunity of citizen groups to intervene as parties in trial-type proceedings where their views are unrepresented, formerly challenged on doctrinal grounds that they lacked a sufficient interest to have "standing," has been greatly broadened by statutes, administrative actions, and judicial decisions. Agency decisionmaking benefits from the additional perspectives provided by informed public participation. However, the scope and manner of public participation desirable in agency hearings has not been delineated. In order that agencies may effectively exercise

their powers and duties in the public interest, public participation in agency proceedings should neither frustrate an agency's control of the allocation of its resources nor unduly complicate and delay its proceedings. Consequently, each agency has a prime responsibility to reexamine its rules and practices to make public participation meaningful and effective without impairing the agency's performance of its statutory obligations.

RECOMMENDATION

In connection with agency proceedings where the agency's decision is preceded by notice and an opportunity to be heard or otherwise to participate—namely, notice-and-comment rulemaking, on-the-record rulemaking and adjudication—each agency should, to the fullest extent appropriate in the light of its capabilities and responsibilities, apply the following criteria in determining the scope of public participation and adopt the following methods for facilitating that participation:

A. *Intervention or other participation.* Agency rules should clearly indicate that persons whose interests or views are relevant and are not otherwise represented should be allowed to participate in agency proceedings whether or not they have a direct economic or personal interest. Whatever the form of the proceeding, reasonable limits should be imposed on who may participate in order: (a) To limit the presentation of redundant evidence, (b) to impose reasonable restrictions on interrogation and argument, and (c) to prevent avoidable delay. In every determination of whether participation is appropriate, the agency should also determine whether the prospective participant's interests and views are otherwise represented and the effect of participation on the interests of existing parties.

1. *Notice-and-comment rulemaking proceedings.* Agencies engaging in notice-and-comment rulemaking should, to the extent feasible: (a) Make available documents, materials and public submissions upon which the proposed rule is based; (b) invite the presentation of all views so that the agency may be apprised of any relevant consideration before formulat-

ing policy; (c) develop effective means of providing notice to the affected public and to groups likely to possess useful information; and (d) if there is a hearing, allocate time fairly among all participants.

2. *On-the-record rulemaking and adjudicative hearings.* Public participation should be freely allowed in trial-type proceedings where the agency action is likely to affect the interests asserted by the participants. Intervention or other participation in enforcement or license revocation proceedings should be permitted when a significant objective of the adjudication is to develop and test a new policy or remedy in a precise factual setting or when the prospective intervenor is the de facto charging party. Public participation in enforcement proceedings, license revocations or other adjudications where the issue is whether the charged respondent has violated a settled law or policy should be permitted only after close scrutiny of the effect of intervention or other participation on existing parties.

B. *Selection of interveners.* Intervention by a particular group or person as a party in a trial-type proceeding should demand upon a balancing of several factors, including:

(a) The nature of the contested issues;

(b) The prospective intervenor's pre-existing interest in the subject matter or possible outcome of the proceeding;

(c) The adequacy of representation provided by the existing parties to the proceeding, including whether these other parties will represent the prospective intervenor's interest and present its views, and the availability of other means (e.g., presentation of views or argument as an *amicus curiae*) to protect its interest;

(d) The ability of the prospective intervenor to present relevant evidence and argument; and

(e) The effect of intervention on the agency's implementation of its statutory mandate.

C. *Scope of participation.* The scope of an intervenor's participation in a trial-type proceeding must assure it a fair opportunity to present pertinent information and to provide the agency a sound basis for decision, without

rendering the hearing unmanageable. The nature of the issues, the intervenor's interests, its ability to present relevant evidence and argument, and the number, interests and capacities of the other parties should determine the dimensions of that participation. In general, a public intervenor should not be allowed to determine the broad outline of the proceeding, such as the scope or compass of the issues. A public intervenor generally should be allowed all the rights of any other party including the right to be represented by counsel, participate in pre-hearing conferences, obtain discovery, stipulate facts, present and cross-examine witnesses, make oral and written argument, and participate in settlement negotiations. Where the intervenor focuses on only one aspect of the proceeding or does not seek to controvert adjudicative facts, consideration should be given to limiting its participation to particular issues, written evidence, argument or the like. Agencies should be cautious in advance of actual experience in anticipating that intervention will cause undue delays.

D. *Cost of participation.* The cost of participation in trial-type proceedings can render the opportunity to participate meaningless. Agencies have an obligation to minimize transcript charges, to avoid unnecessary filing requirements; and to provide assistance in making information available; and they should experiment with allowing access to their staff experts as advisers and witnesses in appropriate cases.

1. *Filing and distribution requirements.* Filing and distribution requirements (e.g., multiple copy rules) should be avoided except as necessary and provision should be made for a waiver where the requirement is burdensome. Existing filing and distribution requirements should be re-examined. Agencies should make every effort to provide duplication facilities at a minimum cost.

2. *Transcripts.* The cost of recording formal proceedings should be borne by the agencies, not by the parties or other participants to the proceeding (except to the extent that a person requests expedited delivery). Existing contracts and arrangements should be

revised to provide for the availability, either through a reporting service or the agency itself, of transcripts at a minimum charge reflecting only the cost of reproducing copies of the agency's transcript. Transcripts should be available without charge to indigent participants to the extent necessary for the effective representation of their interests. Where the aggregate of these transcript costs imposes a significant financial burden on the agency, the agency should seek and Congress should provide the necessary additional appropriation.

3. *Availability of information and experts.* An agency should provide assistance to participants in proceedings before it or another agency, provided that the agency's resources will not be seriously burdened or its operations impaired. Assistance should include advice and help in obtaining information from the agency's files. Each agency should experiment with allowing access to agency experts and making available experts whose testimony would be helpful in another agency's proceedings.

E. *Notice.* Each agency should utilize such methods as may be feasible, in addition to the *FEDERAL REGISTER's* official public notice, to inform the public and citizen groups about proceedings (including significant applications and petitions) where their participation is appropriate. Among the techniques which should be considered are factual press releases written in lay language, public service announcements on radio and television, direct mailings and advertisements where the affected public is located, and express invitations to groups which are likely to be interested in and able to represent otherwise unrepresented interests and views. The initial notice should be as far in advance of hearing as possible in order to allow affected groups an opportunity to prepare. Each agency should consider publication of a monthly bulletin,¹ listing:

(a) The name and docket number or other identification of any scheduled

proceeding in which public intervention may be appropriate;

(b) A brief summary of the purpose of the proceeding;

(c) The date, time and place of the hearing; and

(d) The name of the agency, and the name and address of the person to contact if participation or further information is sought.

EDITORIAL NOTE: Five separate statements were filed concerning this recommendation.

§ 305.71-7 Rulemaking on a Record by the Food and Drug Administration (Recommendation No. 71-7).

§ 305.71-8 Modification and Dissolution of Orders and Injunctions (Recommendation No. 71-8).

Cease-and-desist orders issued by administrative agencies and injunctions obtained by administrative agencies from the Federal courts in the enforcement of regulatory statutes have generally been permanent in duration. As a result of this practice, many orders and injunctions now outstanding are decades old. Such outstanding orders and injunctions may serve no useful purpose and often cause inconvenience and hardship to the respondents. A number of agencies have experimented successfully with techniques for limiting the duration of certain types of orders and injunctions to a set period of time, but this approach is not appropriate in many circumstances. To deal with this situation agencies should therefore have available procedures whereby respondents may seek modification or dissolution of outstanding orders and injunctions.

RECOMMENDATION

A. *Agency cease-and-desist orders.* Each Federal agency that issues a significant number of cease-and-desist orders over which it retains jurisdiction should have a procedure available whereby a respondent may request the agency to modify or vacate a cease-and-desist order that has become final. The factors considered by the agency in ruling upon such a request should include: The period of time the order has been in effect; changed conditions of fact or law during that period; the respondent's compliance with the order; the likelihood of further violations of the order; the hardship which the order imposes on the respondent; the extent of the respondent's compli-

¹ This recommendation does not supersede Recommendation No. 68-4, Consumer Bulletin.

ance with requirements of law that are related to those covered by the order; the interests of other persons or parties affected by the order; the importance of the order to the agency's overall enforcement program; and the public interest in the enforcement of the law.

B. Court-enforced orders. Each Federal agency that obtains a significant number of injunctions in the Federal courts or issues a significant number of cease-and-desist orders which are enforced by Federal courts that retain by statute exclusive jurisdiction over the orders should have a procedure available whereby a respondent may request the agency to join or concur with it in moving the court to modify or vacate such an injunction or order or, in the case of an order issued by the agency, to remand the proceeding to the agency for that purpose. The factors considered by the agency in acting upon such a request should include those stated in paragraph A.

§ 305.71-9 Enforcement of Standards in Federal Grant-in-Aid Programs (Recommendation No. 71-9).

(a) Federal agencies annually disburse billions of dollars in grants-in-aid to State and local governments and to private entities to subsidize activities in such areas as welfare, housing, transportation, urban development and renewal, law enforcement, education, pollution control and health. While State and local governments and private organizations are the direct recipients of the grants, the intended ultimate beneficiaries of the grant programs are private persons helped by the expanded level of support or services made possible by Federal funds.

(b) In administering these grants both public and private grantees must observe the Federal grant standards established to assure the accomplishment of Federal purposes. Federal agencies have often encountered difficulty in enforcing compliance by the grantees with the Federal standards. A factor contributing to this difficulty is that many Federal agencies do not have adequate procedures for resolving questions of compliance and for handling complaints by private persons affected by a grant-in-aid program that the program does not comply with Federal standards. A further contributing factor is that the principal sanction presently available to Federal agencies for securing compliance is to cut off the flow of Federal funds. This sanction raises a serious problem because, unless its threatened imposition prompts compliance, it stops worth-

while programs and adversely affects the interests of the innocent private persons whom the Congress intended to benefit through the program of Federal financial assistance.

(c) To aid in alleviating this situation the following recommendations are proposed with respect to each Federal program in aid of State, local or private activities through which support or services are provided to individual beneficiaries or to the public generally. However, the recommendation does not apply to research, training, or demonstration grants to government units to private organizations or individuals, or to grants such as fellowship grants to individuals that primarily benefit the recipients of the grants.

RECOMMENDATION

A. The Federal administrative complaint procedure. The Federal grantor agency should have an administrative procedure for the receipt and impartial consideration of complaints by persons affected by the grant-in-aid program that a plan, project application or other data submitted by a grant applicant or grantee as a basis for Federal funding does not meet one or more Federal standards. This procedure should afford the complainant an opportunity to submit to the grantor agency for its consideration data and argument in support of the complaint, and should afford the grant applicant or grantee involved a fair opportunity to respond. If the agency determines that the complaint is apparently ill-founded or is insubstantial, it should notify the complainant of its determination and should state in writing the reasons therefor. If the agency determines that the complaint appears to be substantial and supported by the information at hand, it should so notify both the complainant and the grant applicant or grantee of its present determination in this respect and should state in writing the reasons therefor. If the agency exercises discretion not to make a determination on one or more issues raised by a complaint, it should so notify the complainant in writing. The agency should pass upon all complaints within a prescribed period of time.

The complaint procedure administered by the Federal grantor agency should also provide for the receipt and

impartial consideration of complaints that a grantee has in its administration of the funded program failed to comply with one or more Federal standards. It is anticipated that many grantor agencies will find it necessary to limit their consideration of such complaints to situations in which the complainant raises issues which affect a substantial number of persons or which are particularly important to the effectuation of Federal policy and will, therefore, dispose of most individual complaints concerning grantee administration by referring the complainant to such complaint procedures as are required to be established by the grantee. The grantor agency should seek by regulation to define the classes of cases that it will consider sufficiently substantial to warrant processing through the Federal complaint procedure and those classes of cases wherein complainants will be required to pursue a remedy through available complaint procedures administered by the grantee.

B. The grantee's administrative complaint procedures. The Federal grantor agency should require as a grant condition the establishment by the grantee of procedures to handle complaints concerning the grantee's operation of the federally assisted program. These procedures should afford any person affected by an action of the grantee in the operation of the program a fair opportunity to contest that action. The "fair opportunity" to contest will necessarily vary with the nature of the issues involved and the identity and interests of the complainant. In all cases, however, the complainant should have the right to submit to the grantee for its consideration data and argument in support of the complainant's position.

C. The information system. The Federal grantor agency should seek to assure that persons affected by a grant-in-aid program receive adequate information about the program in order that they may take advantage of the Federal and the grantee complaint procedures. The Federal grantor agency should require as a grant condition that all program materials (regulations, handbooks, manuals, etc.) governing the grantee's administration

of a program supported in whole or in part by Federal grant-in-aid funds and all plans, applications and other documents required to be submitted to the Federal agency as a condition to the receipt of Federal funds should be readily accessible to persons affected or likely to be affected by the operation of the funded program. Plans, applications and other documents that provide the basis for Federal funding should be made readily accessible to interested persons no later than the time of their submission to the grantor agency for approval and at an earlier time when required by law.

The Federal grantor agency should seek to assure that the grantee's system for dissemination of program materials and grant submissions takes account of the nature, location and representation of affected persons. For example, as a part of a plan to make such materials readily accessible, program information might be deposited not only in the offices of the grantee but also in public and university libraries and in the offices of affected interest groups and their legal representatives. It might also be necessary to require the provision of descriptive summaries to technical rules or project applications or to require an oral explanation of program features, for example, the complaint procedures, which are critical to the protection of a beneficiary's interests. The Federal agency should make parallel efforts to disseminate materials relating to its administration of the Federal grant program.

D. Range of sanctions. The Federal grantor agency should seek to develop an adequate range of sanctions for insuring compliance with Federal standards by grantees that apply for or receive Federal financial assistance. The sanction of the total denial or cut-off of Federal funds should be retained and used where necessary to obtain compliance, but the agency should have available lesser sanctions that do not result in the prevention or discontinuance of beneficial programs and projects. This range of sanctions should include in appropriate cases:

1. The public disclosure by the agency of a grantee's failure to comply with Federal standards and an indica-

tion of the steps believed by the agency now to be appropriate.

2. An injunctive action brought by the agency or the Department of Justice in the Federal courts to require the grantee to fulfill any assurances of compliance with Federal standards made by the grantee or to enforce the Federal standards attached to the grant.

3. The disallowance as a program or project cost of an expenditure by the grantee that does not conform with Federal standards, or other partial denial or cutoff of funds that affects only that portion of a program or project that is not in compliance with Federal standards.

4. The imposition on a grantee who has not complied with Federal standards of additional administrative requirements specially designed to assure that the grantee brings its operations into compliance with Federal standards and redresses the effects of past noncompliance.

5. The transfer of a grant, or the awarding of subsequent grants under the same or related grant-in-aid programs, to a different grantee if the original grantee violates Federal standards.

Where an agency lacks statutory authority to invoke one or more of the above sanctions and such authority would provide an appropriate means of insuring compliance with Federal standards in a grant-in-aid program administered by the agency, it should seek the necessary authority from the Congress.

E. Other performance incentives. The agency should also consider the provision of incentives, such as the contribution of an increased matching share or the awarding of additional grant funds, to grantees who fulfill certain Federal goals. Where the agency lacks statutory authority to provide compliance incentives and such authority would provide an appropriate means of ensuring effectuation of Federal objectives in a grant-in-aid program administered by the agency, it should seek the necessary authority from the Congress.

§ 305.72-1 Broadcast of Agency Proceedings (Recommendation No. 72-1).

In recent years radio and television broadcasters have sought live or delayed coverage of many kinds of public governmental proceedings. While Canon 35 of the Canons of Judicial Ethics of the American Bar Association states that broadcasting or televising of court proceedings "should not be permitted," the reasons for this policy, to the extent they are applicable to administrative proceedings, are often outweighed by the need to inform the public concerning administrative proceedings, particularly those of broad social or economic impact, and to encourage participation in the understanding of the administrative process. Therefore, the public interest will be served by permitting radio and television coverage of many administrative proceedings, subject to appropriate limitations and controls.

RECOMMENDATION

A. Audiovisual coverage of public administrative proceedings. An agency which conducts proceedings of interest to the general public should adopt regulations, consistent with the principles stated below, which state whether audiovisual coverage of each type of proceeding is permitted, precluded or left to the discretion of the presiding officer or other official under standards determined by the agency.

1. *Proceedings in which audiovisual coverage should be encouraged.* Notice-and-comment and on-the-record rule-making proceedings, and adjudications in which a public interest standard is applied to authorize service or determine its level or quality, normally involve issues of broad public interest. An agency should take affirmative steps to encourage audiovisual coverage of public hearings or oral presentations in such proceedings, including provision of adequate space and facilities, convenient schedules, and the like.

2. *Proceedings in which audiovisual coverage should be excluded.* Audiovisual coverage should be excluded in adjudicatory proceedings involving the rights or status of individuals (including those of small corporations likely to be indistinguishable in the public mind from one or a few individuals) in which individual past culpable conduct or other aspect of personal life is a pri-

mary subject of adjudication and the person in question objects to coverage.

3. *Proceedings in which agencies should balance conflicting values.* In adjudicatory proceedings not governed by paragraphs 1 and 2, an agency should determine whether the drawbacks of audiovisual coverage outweigh the advantages of informing the public. When audiovisual coverage is excluded or restricted, the agency should state the reasons for such exclusion or restriction on the record of the proceeding.

B. *Prevention of disruption.* Audiovisual coverage should be conducted with minimal physical intrusion on the normal course of the proceeding. Agencies should impose reasonable restrictions on lighting, multiple microphones and other possible sources of disruption.

C. *Protection of witnesses.* In any public proceeding a witness should have the right, prior to or during his testimony, to exclude audiovisual coverage of his testimony.

EDITORIAL NOTE: A separate statement was filed concerning this recommendation.

§ 305.72-2 *Conflict-of-Interest Problems in Dealing with Natural Resources of Indian Tribes (Recommendation No. 72-2).*

§ 305.72-3 *Procedures of the United States Board of Parole (Recommendation No. 72-3).*

EDITORIAL NOTE: This recommendation has been largely implemented by Pub. L. 94-233 and agency regulation.

§ 305.72-4 *Suspension and Negotiation of Rate Proposals by Federal Regulatory Agencies (Recommendation No. 72-4).*

The determinations of the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, and Interstate Commerce Commission whether to exercise or refrain from exercising their power to suspend and investigate newly filed rate proposals are of great importance to regulated companies, their customers, and the general public. Although a decision not to suspend does not preclude an agency investigation at a later date (either *sua sponte* or upon complaint), inertia then plays a significant role. Moreover, once a tariff change is effectuated, in most cases the burdens of dislodging an existing rate rest upon its challenger. Since suspension of

a rate initiates a proceeding that is likely to be protracted and costly, a decision to suspend is also an important action. The procedures by which rate proposals are suspended, including the various forms of private negotiation that often accompany the suspension process, can and should be improved.

RECOMMENDATION

A. *Suspension of rate proposals—1. Statement of reasons for suspension.* A rate-making agency in exercising its statutory power to suspend rate proposals should state the reasons for suspension to the extent practicable. Identification by the agency of the limits and sources of its concern, and not merely a recital of statutory criteria, will enable the proponent of the rate to make a more informed decision whether to withdraw the proposal, modify it or persist in it, and will also serve to focus the areas of controversy in the event that the regulated company stands on its proposal and the matter goes to hearing.

2. *"Speaking" orders of suspension.* Rate-making agencies which are not authorized to prescribe rates without public proceedings should not provide in suspending a rate a detailed statement of a substitute proposal that the agency would allow to go into permanent effect without suspension. The expression of detailed agency views concerning an acceptable rate should not be used as a means of prescribing a rate without allowing interested persons an opportunity to participate.

B. *Negotiation between the agency and the regulated company.* A rate-making agency should not rely on a pattern of regulation consisting largely or solely of informal negotiation by the members of the agency with regulated companies in order to influence, shape or pre-audit rate proposals to be filed in the future. In the short run negotiation may appear efficient because it avoids the burden of complex public proceedings. In the long run, however, over-reliance on negotiation may inhibit the development of an adequate staff, compromise the independence of the agency in passing on protests and complaints against negotiated rates, delay the development of an adequate methodology of regula-

tion, and result in a failure to formulate visible and predictable standards. The development of such standards is critical to expeditious disposition of rate proceedings. Since negotiation with respect to rates could preclude effective participation by others who have a direct interest in the outcome, any negotiation undertaken should, to the extent practicable, be conducted in proceedings open to them.

C. Authorization of temporary and partial increases. Regulatory statutes should be amended, to the extent that existing authority is lacking, to authorize rate-making agencies, as an adjunct to their power to suspend, to allow temporary rate increases, including partial increases, subject to appropriate conditions (including, where practicable, provision for refund if the interim increase is ultimately found unjustified). A temporary increase should be authorized only when the agency makes a preliminary judgment, on the basis of a written showing by the regulated company and an opportunity for comment thereon by affected persons, that a proposed increase is justifiable at least in part. Exercise of authority to grant temporary increases, rather than suspending a proposed increase in full or allowing it to go into effect without suspension, would mitigate the effects of regulatory lag. Similar authority to allow temporary and partial rate reductions, or other temporary changes, should also be sought where appropriate.

D. Settlement of rate proceedings—1. Settlement by agreement of the parties. Settlement of rate proceedings by agreement among the parties, either before or after an evidentiary hearing, is appropriate and desirable if the agency, on the basis of the available record and any further written submissions, is in a position to determine that the disposition is in the public interest.

2. Settlement in the absence of agreement. Disposition of a rate proceeding on the basis of a proposed settlement, in the absence of full agreement by the parties, should turn upon the nature of the issues involved in the proceeding and the appropriateness of an evidentiary hearing for a fair, accurate, and efficient decision of those

issues. The degree of consensus among the parties and the nature of the interests represented by any objecting parties are factors which the agency may consider in determining whether a settlement is in the public interest. In situations in which a participant who is objecting to a proposed disposition does not show that a genuine issue of material fact is involved, an agency may dispose of a rate proceeding on the basis of written submissions without holding an evidentiary hearing for purposes of cross-examination. The Administrative Procedure Act requires cross-examination only insofar as it is required "for a full and true disclosure of the facts," 5 U.S.C. 556(d).

E. Screening of tariff adjustments by the Interstate Commerce Commission Staff. The disposition of rate matters by the Interstate Commerce Commission presents special problems because of the enormous volume of tariff adjustments, given the existing regulatory scheme, which it receives from a very large number of companies performing a wide variety of transportation services. The Commission, largely because of limitations of manpower, now relies almost entirely upon the self-interest of competitive carriers and of shippers to alert it by the filing of protests to matters warranting its serious consideration. To the extent that resources and priorities permit, the Commission should assume a greater burden of screening tariff adjustments on its own initiative.

EDITORIAL NOTE: A separate statement was filed concerning this recommendation.

§ 305.72-5 Procedures for the Adoption of Rules of General Applicability (Recommendation No. 72-5).

(a) The Administrative Procedure Act, 5 U.S.C. 553 (1970), provides simple, flexible and efficient procedure for rulemaking including publication of a notice of proposed rulemaking in the FEDERAL REGISTER, opportunity for submission of written comments, and opportunity in the discretion of the agency for oral presentation. This notice-and-comment rulemaking procedure is extensively used and on the whole has worked well. Each agency is of course free to provide additional procedural protection to private parties in any proceeding.

(b) There are statutes that require procedures in addition to those required by section 553. Some require opportunity for oral arguments, some require agency consultation with advisory committees, and some require trial-type procedure.

(c) The Administrative Conference believes that statutory requirements going beyond those of section 553 should not be imposed in absence of special reasons for doing so, because the propriety of additional procedures is usually best determined by the agency in the light of the needs of particular rulemaking proceedings. The Administrative Conference emphatically believes that trial-type procedures should never be required for rulemaking except to resolve issues of specific fact.

RECOMMENDATION

1. This recommendation applies only to rules of general applicability and not to rules of particular applicability, only to substantive rules and not to procedural rules, only to legislative rules and not to interpretative rules, and only to rulemaking governed by section 553 and not to rulemaking excepted from the requirements of section 553.

2. In future grants of rulemaking authority to administrative agencies, Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. 553, except that when it has special reason to do so, it may appropriately require opportunity for oral argument, agency consultation with an advisory committee, or trial-type hearings on issues of specific fact.

3. Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact. Ordinarily it should not require such procedures for making rules of general applicability, except that it may sometimes appropriately require such procedures for resolving issues of specific fact. Existing statutes imposing a requirement of trial-type procedures for rulemaking of general applicability should be reexamined in light of these principles.

4. A study of proceedings conducted by the Food and Drug Administration pursuant to section 701(e) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(e) (1970), has demonstrated that that section should be amended so as to make clear that trial-type

hearings are not required except on issues of specific fact.

5. Each agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond those of section 553, such as opportunity for oral argument, agency consultation with an advisory committee, opportunity for parties to comment on each other's written or oral submissions, a public-meeting type of hearing, or trial-type hearing for issues of specific fact.

§ 305.72-6 Civil Money Penalties as a Sanction (Recommendation No. 72-6).

(a) Federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed.¹ During Fiscal 1971, seven executive departments and thirteen independent agencies collected well in excess of \$10 million, in over 15,000 cases; all evidence points to a doubling or tripling dollar magnitude and substantially increasing caseload within the next few years.

(b) Increased use of civil money penalties is an important and salutary trend. When civil money penalties are not available, agency administrators often voice frustration at having to render harsh "all-or-nothing decisions" (e.g., in license revocation proceedings), sometimes adversely affecting innocent third parties, in cases in which enforcement purposes could better be served by a more precise measurement of culpability and a more flexible response. In many areas of increased concern (e.g., health and safety, the environment, consumer protection) availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals.

(c) In developing a range of sanctions adequate to meet enforcement needs, Congress and agencies must often determine whether a "criminal fine" or a "civil money penalty,"

¹For purposes of this recommendation, no distinction has been drawn between sanctions denominated "money penalties" and sanctions denominated "forfeitures" (e.g., in FCC legislation) and "fines" (e.g., in Postal Service legislation) so long as: (i) The sanction is classified as civil and (ii) money is, in fact, subject to collection by an agency or a court. Excluded are situations involving penalties or liquidated damages assessed pursuant to the terms of a government contract or sums withheld or recovered for failure to comply with the terms of a government grant.

or both, should be applied to a given regulatory offense. The choice they make has large consequences. Criminal penalties expose an offender to the disgrace and disabilities associated with "convictions"; they require special procedural and other protections; and they can not be imposed administratively. These factors make it appropriate to consider whether criminal sanctions should not be supplemented or replaced by civil money penalties.

(d) Under most money penalty statutes, the penalty cannot be imposed until the agency has succeeded in a *de novo* adjudication in federal district court, whether or not an administrative proceeding has been held previously. The already critical overburdening of the courts argues against flooding them with controversies of this type, which generally have small precedential significance.

(e) Because of such factors as considerations of equity, mitigating circumstances, and the substantial time, effort and expertise such litigation often requires in cases usually involving relatively small sums (an average of less than \$1,000 per case), agencies settle well over 90 percent of their cases by means of compromise, remission, or mitigation. Settlements are not wrong *per se*, but the quality of the settlements under the present system is a matter of concern. Regulatory needs are sometimes sacrificed for what is collectible. On the other hand, those accused sometimes charge that they are being denied procedural protections and an impartial forum and that they are often forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. Moreover, several agency administrators warn that some of the worst offenders, who will not settle and cannot feasibly be brought to trial, are escaping penalties altogether.

This recommendation is intended to meet the problems posed above.

RECOMMENDATION

A. Desirability of Civil Money Penalties as a Sanction. 1. Federal administrative agencies should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction. Such penalties should not be adopted as a means of supplanting or curtailing other private or public civil remedies.

2. Civil money penalties are often particularly valuable, and generally should be sought, to supplement those more potent sanctions already available to an agency—such as license suspension or revocation—whose use may prove: (a) Unduly harsh for relatively

minor offenses, or (b) infeasible because, for example, the offender provides services which cannot be disrupted without serious harm to the public.

3. Each federal agency which administers laws that provide for criminal sanctions should review its experience with such sanctions to determine whether authorizing civil money penalties as another or substitute sanction would be in the public interest. Such authority for civil money penalties would be particularly appropriate, and generally should be sought, where offending behavior is not of a type readily recognizable as likely to warrant imprisonment.

B. Adjudication of Civil Money Penalty Cases in an Administrative Imposition System. 1. In some circumstances it is desirable to commit the imposition of civil money penalties to agencies themselves, without subjecting agency determinations to *de novo* judicial review. Agencies should consider asking Congress to grant them such authority.³

Factors whose presence tends to commend such a course with respect to a particular penalty provision include the following:

(a) A large volume of cases likely to be processed annually;

(b) The availability to the agency of more potent sanctions with the resulting likelihood that civil money penalties will be used to moderate an otherwise too harsh response;

(c) The importance to the enforcement scheme of speedy adjudications;

(d) The need for specialized knowledge and agency expertise in the resolution of disputed issues;

(e) The relative rarity of issues of law (e.g., statutory interpretation) which require judicial resolution;

(f) The importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications; and

³Due to the special procedures and status of the United States Tax Court, the rationale for administrative imposition may have only limited applicability to civil money penalties administered by the Internal Revenue Service.

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(g) The likelihood that an agency (or a group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

Considerations such as those set forth above should be weighed heavily in favor of administrative imposition when the usual monetary penalty for an offense or a related series of offenses would be relatively small, and should normally be decisive when the penalty would be unlikely to exceed \$5,000. However, the benefits to be derived from civil money penalties, and the administrative imposition thereof, should also be considered when the penalties may be relatively large.

2. An administrative imposition system should provide:

(a) For and adjudication on the record pursuant to the Administrative Procedure Act, 5 U.S.C. 554-57 (1970), at the option of the alleged offender or the agency;

(b) For finality of an agency's decision unless appealed within a specified period of time;

(c) That, if the person on whom the penalty is imposed appeals, an agency's decision will be reviewed in United States Courts of Appeals under the substantial evidence rule in accordance with the Administrative Procedure Act, 5 U.S.C. 706(e);

(d) That issues made final by reason of (b) above and issues which were raised, or might have been raised, in a proceeding for review under (c) above may not be raised as a defense to a suit by the United States for collection of the penalty.

Agencies should adopt rules of practice which will enable just, inexpensive and speedy determinations. They should provide procedures for settlement by means of remission, mitigation or compromise.

§ 305.72-7 Pre-induction Review of Selective Service Classification Orders and Related Procedural Matters (Recommendation No. 72-7).

§ 305.72-8 Adverse Actions Against Federal Employees (Recommendation No. 72-8).

§ 305.73-1 Adverse Agency Publicity (Recommendation No. 73-1).

(a) Adverse agency publicity—that is, statements made by an agency or its personnel which invite public attention to an agency's action or policy and which may adversely affect persons identified therein—can cause serious and sometimes unfair injury. Where a reasonable and equally effective alternative is not available, adverse agency publicity is often necessary to warn of a danger to public health or safety or a threat of significant economic harm, or to serve other legitimate public purposes. However, adverse agency publicity is undesirable when it is erroneous, misleading or excessive or it serves no authorized agency purpose.

(b) Agency practices regarding adverse publicity vary widely. Some agencies use adverse publicity as the primary method of enforcement; for some others it is merely action incidental to formal sanctions. Agency rules seldom establish procedures or standards for the use of adverse agency publicity, and it is almost never subject to effective judicial review.

(c) In meeting these concerns, this recommendation addresses agency use of adverse publicity in connection with investigatory, rulemaking and agency adjudicatory processes as well as informal agency actions. It recommends the adoption of agency rules containing minimum standards and structured practices governing the issuance of publicity.

RECOMMENDATION

Each agency should state in its published rules the procedures and policies to be followed in publicizing agency action or policy, and internal operating practices should assure compliance. In the adoption of such procedures and policies, each agency should

¹Publicity as used here is distinguished from the mere decision to make records available to the public rather than preserve their confidentiality. That decision is governed by separate criteria set forth in the Freedom of Information Act (5 U.S.C. 552) and is not within the scope of this recommendation.

balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity in accordance with the following standards:

1. All adverse agency publicity should be factual in content and accurate in description. Disparaging terminology should be avoided.

2. Adverse agency publicity relating to regulatory investigations of specifically identified persons or pending agency trial-type proceedings should issue only in limited circumstances in accordance with the criteria outlined below.

a. Where an agency determines that there is a significant risk the public health or safety may be impaired or substantial economic harm may occur unless the public is immediately notified, it may use publicity as one of the means of speedily and accurately notifying the affected public. However, where public harm can be avoided by immediate discontinuance of an offending practice, a respondent should be allowed an opportunity, where feasible, to cease the practice (pending a legal test) in lieu of adverse agency publicity.

b. Where it is required in order to bring notice of pending agency adjudication to persons likely to be desirous of participating therein or likely to be affected by that or a related adjudication, the agency should rely on publicity to the extent necessary to provide such notice even though it may be adverse to a respondent.

c. Where information concerning adverse agency action is available to the public regardless of agency publicity measures and is likely to result in media publicity, adverse agency publicity should be issued only to the extent necessary to foster agency efficiency, public understanding, or the accuracy of news coverage.

3. Adverse agency publicity not included in paragraph 2 above should issue only after the agency has taken reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose.

4. Where information in adverse agency publicity has a limited basis—

for example, allegations subject to subsequent agency adjudication—that fact should be prominently disclosed. Any respondent or prospective respondent in an agency proceeding should, if practicable and consistent with the nature of the proceeding, be given advance notice of adverse agency publicity relating to the proceeding and a reasonable opportunity to prepare in advance a response to such publicity.

5. Where adverse agency publicity is shown to be erroneous or misleading and any person named therein requests a retraction or correction, the agency should issue the retraction or correction in the same manner (or as close thereto as feasible) as that by which the original publicity was disseminated.

[38 FR 16839, June 27, 1973]

§ 305.73-2 Labor Certification of Immigrant Aliens (Recommendation No. 73-2).

[38 FR 16840, June 27, 1973]

§ 305.73-3 Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation (Recommendation No. 73-3).

(a) The Federal government is engaged in either the direct administration or the funding of a substantial number of programs which involve the adjudication of claims of entitlement to benefits or compensation. Examples include veterans' benefits; the basic Social Security (OASDI) programs; Medicare and Medicaid; public employee retirement benefits; federal employees' and longshoremen's and harbor workers' compensation programs; and programs of categorical public assistance for the aged, blind and disabled and for dependent children.

(b) In many of these programs the number of claims per year is very large while at the same time the determinations of fact and law involved in adjudicating an individual claim may be quite complex and difficult. Moreover, claimants under these programs often lack the personal resources or access to technical assistance necessary to prepare claims material adequately and to pursue hearing or administrative appeal procedures should their claims be denied. These factors give rise to a particular concern with the quality of the adjudication process and product at all levels of the administrative process in programs which make determinations concerning large num-

bers of claims of entitlement to individual benefits or compensation.

(c) As a part of a continuous effort to provide the highest possible degree of accuracy, timeliness and fairness in the adjudication of claims, the following recommendations should be adopted by agencies which directly administer benefit and compensation programs and by agencies which have a capacity and a responsibility to assure the quality of claims adjudication by grantees of federal funds.

RECOMMENDATION

1. Positive caseload management should be recognized as essential to the accurate, timely and fair adjudication of claims of entitlement to benefits or compensation. A positive caseload management system should include three connected operations: (1) The development of standards and methods for measuring the accuracy, timeliness and fairness of agency adjudications; (2) the continuous evaluation of agency adjudications through the application of those standards and methods; and (3) the use of the information gathered in the course of such evaluation to identify needed improvements in adjudicative performance.

2. As part of their positive caseload management program, agencies should begin immediately to explore, develop and implement statistical quality assurance reporting systems that will indicate the accuracy, timeliness and fairness of claims processing. In designing such systems, agencies should consider the need for information of a type that:

(a) Reflects differences in the types of cases and types of issues adjudicated and the stages of the administrative process involved;

(b) Identifies the management unit or, where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance;

(c) Permits separate evaluation of: (1) Substantive decision-making, (2) case development effort and (3) procedural regularity;

(d) Enables separate evaluation of particular functions of the decision process (e.g., issue statement or evaluation of evidence in substantive decision-making).

3. Agencies should employ such other techniques for gathering information on their adjudication process, including field investigations and special studies, as are required for the evaluation of accuracy, timeliness and fairness. Agencies should be particularly sensitive to the need for better information on the extent to which claimants' personal resources, social status, and access to representation or other assistance may affect the adjudication of claims.

4. The positive caseload management program should facilitate not only objective evaluation of the agency's case processing operation, but also the effective utilization of quality assurance information in policy formation and operational control.

[38 FR 16840, June 27, 1973]

§ 305.73-4 Administration of the Anti-dumping Law by the Department of the Treasury (Recommendation No. 73-4).

[39 FR 4846, Feb. 7, 1974]

§ 305.73-5 Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements (Recommendation No. 73-5).

(a) The basic principle of the rulemaking provisions of the Administrative Procedure Act—that an opportunity for public participation fosters the fair and informed exercise of rulemaking authority—is undercut by various categorical exemptions in 5 U.S.C. 553(a). More than 25 years' experience with rulemaking under the APA has shown some of these broad exemptions to be neither necessary nor desirable. The Administrative Conference has previously recommended elimination of the exemptions for matters "relating to public property, loans, grants, benefits, or contracts" (Recommendation 69-8, October 22, 1969). Since rules on those subjects may bear heavily on nongovernmental interests, the Conference concluded that their categorical exemption from generally applicable procedural requirements was unwise. For similar reasons, the breadth of the present exemption for all rules which involve a "military or foreign affairs functions" is unwarranted.

(b) As with the earlier Recommendation, elimination of the categorical exemption for military or foreign affairs functions would not diminish the power of the agencies to omit APA rulemaking procedures when their observance is found to be impracticable, unnecessary, or contrary to the public

interest, or when other exemptions contained in section 553 are applicable, such as those for "general statements of policy" or for rules relating to "agency management or personnel." In addition, the present Recommendation would retain limited exemptive provisions specially directed to the needs of military and foreign affairs rulemaking.

RECOMMENDATION

(1) The APA's categorical exemption for "military or foreign affairs function" rulemaking should be eliminated.

(2) Two aspects of special concern in the military and foreign affairs areas should be dealt with by modified exemptive provisions in place of the present categorical one:

(a) Rulemaking in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense or foreign policy should be exempted on the same basis now applied in the freedom of information provision, 5 U.S.C. 552(b)(1). That is, section 553(a) should contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

(b) Some of the agencies affected by elimination of the categorical exemption issue numerous rules for which public procedures would be inappropriate or unnecessary. Such agencies would find it burdensome to make case-by-case findings that the usual procedures are "impracticable, unnecessary, or contrary to the public interest" under section 553(b)(B). Repeal of the categorical exemption for "military or foreign affairs functions" should not be construed to discourage use of the implicit power to apply the section 553(b)(B) exemption on an advance basis to narrowly drawn classes of military or foreign affairs rulemaking. It is therefore recommended that repeal of the exemption be accompanied by statutory clarification of the agencies' power to prescribe by rule specified categories of rulemaking exempt by reason of section 553(b)(B), provided that the appropriate finding and a brief statement of reasons are set forth with respect to each category. Though it would not be mandatory, agencies should consider using

notice-and-comment procedures for adoption of the exemptive rule itself. Statutory amendment should also amplify the existing section 553(b)(B) standards for exemption by including specific reference to the national interest in the military-foreign affairs area.¹

(3) Wholly without statutory amendment, agencies already have the authority to use the generally applicable APA procedures for rulemaking when formulating rules of the exempt types. They are urged to do so, wherever appropriate, in matters now excluded by the "military or foreign affairs function" exemption.

APPENDIX

Section 553(a) and the relevant part of 553(b), amended in accordance with this recommendation, might read as follows:

Sec. 553. *Rule making.* (a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) A matter pertaining to a military or foreign affairs function of the United States specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; or

(2) A matter relating to agency management or personnel (or to public property, loans, grants, benefits, or contracts).²

(b) . . .

Except when notice or hearing is required by statute, this subsection does not apply—

.

(B) When the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest (including national interest factors if a military or foreign affairs function is involved). The agency shall incorporate in each rule issued in reliance upon this provision either: (i) The finding and a brief statement of reasons therefor, or (ii) a statement that the rule is within a category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made.

[39 FR 4847, Feb. 7, 1974]

¹An Appendix to this recommendation sets forth suggested language to effect the changes recommended by paragraph (2).

²Recommendation 69-8 proposes the deletion of the bracketed phrase.

§ 305.73-6 Procedures for Resolution of Environmental Issues in Licensing Proceedings (Recommendation No. 73-6).

(a) The new environmental legislation, especially the National Environmental Policy Act, has imposed on licensing agencies responsibility to consider environmental values in licensing that involves major Federal action significantly affecting the environment. The new responsibility has created new difficulties and has exacerbated old problems for the agencies.

(b) The nature, complexity and sheer number of the issues to be considered make it desirable that the agencies, in appropriate cases, treat generically issues common to more than one proceeding. In addition to promoting agency efficiency, such treatment will permit more effective presentations by interested organizations which may lack the necessary resources for appearances in all the individual cases in which the same generic issue is present. It is especially important, given the wide public interest in environmental issues, that the public be given adequate notice of the generic proceeding and of the issues being considered.

RECOMMENDATION

A. Generic proceedings. 1. Each licensing agency should analyze the activities subject to its jurisdiction to identify environmental issues common to more than one application and appropriate for across-the-board treatment. Issues so identified should be made the subject of "generic" proceedings, with the conclusions published and binding in subsequent cases as set forth in paragraph 3.

2. Each licensing agency should exercise discretion consistent with its governing statute to define the format of such a generic proceeding. Opportunity should be afforded for the presentation of oral testimony and cross-examination where required by law or where the agency considers it desirable for the development of an adequate record relevant to the particular issues.

3. Each licensing agency should select such form of procedure as will enable it ordinarily to apply generic decisions in subsequent licensing proceedings: (a) Without departure except where special local circumstances justify individualized treatment, and (b) without reexamination

except where changed circumstances, e.g., material information not previously available to the agency, or a change in applicable law, raise a substantial question as to the continuing validity of the decision. Where the agency determines to reexamine the generic decision in whole or in part, it should consider the advisability of suspending final disposition of the licensing proceeding pending the conclusion of a new generic proceeding, and should, in any event, provide to affected interests adequate notice and opportunity to participate in the reexamination.

4. The agency should recognize a duty to reexamine generic decisions from time to time, as, for example, where technology is changing, or where currently available information indicates the need for modification.

5. The giving of binding effect to generic decisions creates potentially serious problems for the general public, who will not ordinarily be aware of the existence of a proceeding. Accordingly, the agency must be careful to structure requirements of notice in such a way as to ensure that persons in areas likely to be affected by future licenses and environmental groups who have exhibited interest in related problems receive adequate notice.

B. Public information. 1. Each licensing agency should make it a standard practice to disclose and make available to the public at the earliest practicable date all of the basic studies, reports and other documents, not excepted by law or privileged against disclosure, upon which the application or any recommendation or position of the agency or its staff is based and which the agency may reasonably anticipate will be sought to be obtained during the proceeding; and the agency should require applicants to follow a similar practice at the time an application is filed.

2. Environmental statements should be drafted in terms understandable to laymen and regulations for license applications should stress as a major goal provision of information to the public on environmental questions.

EDITORIAL NOTE: Two separate statements were filed concerning the recommendation.

§ 305.74-1

[39 FR 4848, Feb. 7, 1974]

§ 305.74-1 Subpena Power in Formal Rulemaking and Formal Adjudication (Recommendation No. 74-1).

The present recommendation implements, and somewhat expands, the statement of principle adopted by the Conference in June 1973 with respect to the American Bar Association's Resolution No. 10 concerning proposed amendments to the Administrative Procedure Act. It speaks only to the issue of subpoena authority in formal proceedings under the Administrative Procedure Act, and does not reflect any judgment as to the need for general or specific grants of subpoena authority in other situations.

RECOMMENDATION

The Administrative Procedure Act should be amended: (1) To make agency subpoenas available in all agency proceedings, both rulemaking and adjudication, which are subject to sections 556 and 557 of Title 5, United States Code, and (2) to make clear that the power to issue subpoenas in such proceedings shall be delegated to presiding officers.

We propose the following amendments to implement this recommendation:

1. Amend section 555(d) of Title 5, United States Code to read as follows:

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpoenas. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

2. Amend section 556 of title 5, United States Code to add the words "subpoena authority;" in the heading after the words "powers and duties;"

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to delete the words "authorized by law" in subparagraph (c)(2), to redesignate subsections (d) and (e) as (e) and (f) respectively, and to add the following subsection (d):

(d) In any proceeding subject to the provisions of this section, the agency is authorized to require by subpoena any person to appear and testify or to appear and produce books, papers, documents or tangible things, or both, at a hearing or deposition at any designated place. Subpoenas shall be issued and enforced in accordance with the procedures set forth in section 555(d) of this title. In case of failure or refusal of any person to obey a subpoena, the agency, through the Attorney General unless otherwise authorized by law, may invoke the aid of the district court of the United States for any district in which such person is found or resides or transacts business in requiring the attendance and testimony of such person and the production by him of books, papers, documents or tangible things. The authority granted by this subsection is in addition to and not in limitation of any other statutory authority for the issuance of agency subpoenas and for the judicial enforcement thereof.

[39 FR 23041, June 26, 1974]

§ 305.74-2 Procedures for Discretionary Distribution of Federal Assistance (Recommendation No. 74-2).

(a) The provision of assistance by the Government has a major impact upon the general public, as well as upon those who seek aid and those who particularly benefit from it. As with other governmental activity of similar importance, in dispensing assistance agencies should not be free to act completely within their own discretion, *ad hoc*, unguided by standards and insulated from the complaints of those who dispute the propriety of agency decisions. Such unchanneled discretion not only creates the occasion for arbitrary action, but also prevents the agencies from giving their programs the effective policy direction essential for the achievement of statutory aims.

(b) This Recommendation calls upon each agency which has discretion in the distribution of assistance under a domestic program to identify publicly the specific results it expects the assistance to achieve; to develop criteria based on that formulation for awarding aid; and to utilize public procedures for developing and enforcing the pro-

gram's criteria and other requirements. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of decision-making by creating a stimulus towards analysis and specification of program aims. Applicants and recipients benefit from more consistent and predictable assistance terms, and from the open opportunity to seek an award. The affected public can monitor compliance in a way that promotes program purposes. And agency actions become more comprehensible to all involved.

(c) The Conference has previously adopted two recommendations directed to particular categories of assistance programs covered by the present Recommendation and urging with respect to those categories, some of the same measures here proposed. Moreover, those earlier recommendations, since they were more narrowly focused, set forth procedures in addition to those here proposed, useful for the particular types of assistance programs they covered. Recommendation 71-4, dealing only with discretionary grant programs, urges, as does the present Recommendation, the development of criteria by rulemaking and sets forth particularized public notice and applicant notification procedures appropriate for that type of Federal assistance. Similarly, Recommendation 71-9, directed only to grant-in-aid programs, describes in some detail complaint procedures and information systems particularly applicable to that type of Federal assistance. The present Recommendation is not meant to supersede those earlier proposals; but where it suggests additional procedures not there described, it is intended to supplement them.

RECOMMENDATION

A. Scope of the Recommendation. In its broadest sense, Federal assistance includes any expenditure made by the Government to provide goods or services to the public, whatever the form of transfer; thus it includes money grants and benefits, in-kind aid, financing, insurance, and the permitted use of public goods. This Recommendation is directed to domestic programs for the provision of all forms of assistance except services (where personnel considerations must be given special account). Since, however, the purpose of the Recommendation is to regularize agency exercise of discretion in the distribution of assistance, its provisions do not apply to programs in which no such discretion exists (e.g., "benefit" and "formula" programs in which aid is distributed

on the basis of statutory entitlement); nor do they apply to contractual agreements covered by the Government's procurement regulations and its system of award and dispute procedures.

B. Articulation of Objectives, Criteria and Requirements—1. Statement of Objectives and Criteria. Each agency that has discretionary authority to determine the recipients under an assistance program, and the terms, amounts and purposes of awards, should publicly state the specific results which it expects the assistance to achieve. The agency should also identify any major technical obstacles hindering the achievement of these objectives, describe its strategy for overcoming them and make this statement public where doing so would not frustrate accomplishment of the program's goals. On the basis of such formulation, the agency should articulate the criteria guiding its actions in making awards. Periodically, the agency should review the adequacy of its program objectives and assistance criteria in light of the results achieved and changes in the public need.

2. Nature of Assistance Criteria. To ensure performance-related, impartial choice in selection of recipients, whenever possible the agency's assistance criteria should provide for the award of aid either on an entitlement basis, to all who meet specified requirements, or on a competitive basis, to those who best satisfy stated selection factors. While considerable judgment may be left to the decision-maker in their application, the criteria should provide sufficient guidance to enable determinations to be made on a rational and justifiable basis.

In research, demonstration, developmental and other experimental programs, however, an agency will not always be able to specify its assistance criteria fully because of uncertainty about the results to be sought and the means of their achievement. To a corresponding degree, the choice of a recipient will involve greater judgment and in many instances subjective choice. Nevertheless, at each stage of program development, the agency should refine its selection basis and

provide as equal an opportunity to compete as it can.

3. *Requirements imposed on recipients.* The agency should state clearly any specific results it expects the recipient to achieve. Where possible it should promulgate these and any other requirements it imposes on the operation or fiscal administration of assisted programs in the form of generally applicable rules, in preference to attaching such requirements as special conditions to particular assistance agreements.

4. *Degree of Specificity.* Agencies should state their objectives, criteria and requirements with as much specificity as practicable, and with clear indication of their purpose. Since, however, flexibility in the actual operation of assistance programs is useful, and diversity of approach often necessary, requirements relating to the manner of operation of recipients should be only as detailed and specific as is necessary to realize the program objective.

5. *Procedures for Development.* Agencies should develop their assistance criteria and generally applicable requirements through a procedure involving public participation, by following the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553.

C. *Complaint Procedures*—1. *Establishment of Complaint Procedures.* Agencies benefit by encouraging affected persons to report instances in which, in their belief, Federal standards (including the criteria for distribution of aid and any statutory or regulatory requirements) are not being observed in program administration. Such reports provide a source of information concerning operational problems and successes, supplementing whatever audits and field inspections the agency may conduct. Assertions that standards are being disregarded are indicative of program problems that the Federal agency must solve, by revising its own operations, by invoking sanctions for non-compliance or by re-examining the adequacy and appropriateness of the requirements themselves. Consequently, assistance agencies should make procedures available by which persons may formally report

that Federal standards intended to benefit or protect them are being violated.

2. *Nature of Procedures.* Agencies should permit dissatisfied persons a suitable opportunity to submit information and argument in support of their assertions. The agency should specify the complaint procedure or procedures applicable to each of the programs it administers.

D. *Application to Delegated Programs.* In some programs, assistance recipients have been delegated an administrative role like that of Federal agencies in discretionary programs: the delegatee-recipient agency dispenses assistance and exercises some discretionary power to decide who will receive aid, in what amounts, on what terms, and for what purposes. An example is the role of community action agencies under the Economic Opportunity Act, 42 U.S.C. 2701, et seq. In such programs, if it has the power to do so, the Federal agency should direct such recipients to observe Part B of this Recommendation, and to adopt procedures in accordance with Part C for receiving reports alleging violation by the recipient of its own established objectives, criteria and requirements. Reports alleging that the recipient's objectives, criteria and requirements do not accord with Federal standards should be entertained at the Federal agency level.

EDITORIAL NOTE: One separate statement was filed concerning the recommendation.

[39 FR 23041, June 26, 1974]

§ 305.74-3 Procedures of the Department of the Interior with Respect to Mining Claims on Public Lands (Recommendation No. 74-3).

(a) Although largely unknown to lawyers outside the West, the Department of the Interior's disposition of mining claims on public lands is a significant field of Federal administrative activity and an important element in planning rational use of the public lands.

(b) The procedures for establishing or "locating" mining claims are set out by the General Mining Law of 1872, which has not been significantly amended since its passage. A claim is located by marking the corners of the acreage claimed, posting a notice on the land, and, if State law requires, per-

forming specified work. Notice is then filed in the county courthouse. No valuable mineral need have been found, nor is the prospector under any obligation to reveal what mineral he believes to be present in order to exclude possible rivals from the land. A valid possessory interest is acquired against the United States, however, only if a "valuable" mineral deposit has been "discovered." If certain formalities are then complied with, the prospector may convert this possessory interest into full title, or "patent," for a modest sum; the possessory interest in a demonstrably valid claim is so secure, however, that such purchases are rarely sought. Claims are neither registered with the Federal Government nor paid for unless a patent is sought; nor need any discovery of valuable mineral be formally recorded anywhere in advance of a possible application for patent.

(c) In the view of the Department of the Interior, a claim may be valid even if inactive; all claims are regarded as potential clouds on the Government's title. Thus, when a dam is to be built or a National Park secured, obtaining clear title to the land requires the Government to identify claims for which patent applications have not been made. This currently requires Bureau of Land Management employees to make a painstaking search of disorganized and ancient county records for each possibly valid claim and for evidence for its descent. Part A of the present recommendation urges the elimination of this wasteful and uncertain system by establishment of a registration process, and suggests interim measures which the Department may take until that legislation is enacted.

(d) Once the identity of existing claimants is known, the present system provides for testing the validity of their claims by formal administrative adjudications in which, although the burden of persuasion is upon the claimant, the Government must first establish *prima facie* that no "discovery" of any "valuable" mineral has been made. It must do this without the benefit of subpoena power, or even of any requirement that the claimant define his claim (e.g., by stating the nature of the minerals discovered) before the Government puts on its case. The practical effect of these hearing procedures is that a mineral examiner must be sent to inspect every claim that may be asserted. Adjudication is performed by administrative law judges in the Department's Office of Hearings and Appeals, subject to *de novo* review by the Board of Land Appeals in the same Office. Although the Department has full rulemaking authority, it has typically used case adjudication to develop positions on such central issues as what constitutes the "discovery" necessary to render a claim valid against the Government. To the extent cases are decided on

the basis of interpretations or policy that a court would find within the Secretary's discretion, the Department's Office of Hearings and Appeals exercises important policy-making functions; yet at present no provision is made for Secretarial review of its conclusions. Judicial review of these adjudicatory determinations can be obtained only in United States District Court, in accordance with the so-called "nonstatutory review" provisions of 5 U.S.C. 703. The "substantial evidence" standards of 5 U.S.C. 706(2)(E) is of course applicable, but some confusion remains as a result of early cases treating the Department's findings of fact as near-conclusive. Part B of the present Recommendation seeks to rationalize the Department's adjudicatory system by providing fairer and more efficient hearing procedures, bringing the Department's case law more closely within a unified policy-making structure, and establishing judicial review provisions in appellate rather than trial-level federal courts, with explicit affirmation of the APA standard of review.

(e) Although not required to do so by statute, the Department of the Interior commendably makes use of notice-and-comment rulemaking procedure, both for adoption of regulations to be codified in the Code of Federal Regulations and for actions withdrawing public lands from use under the various public land laws, including the mining laws. Public participation in such rulemaking, however, is substantially impaired by the lack of ready access to geologic data and other Government-developed data and views relating to rulemaking proposals. Moreover, other information important to the public, pertaining to matters of law, policy, procedure and Departmental organization, is not available as readily, or in as comprehensible a form, as it should be. Part C of the present Recommendation suggests requirements to render the Department's rulemaking process more effective and to facilitate citizen receipt of needed information.

RECOMMENDATION

A. Identification of Claims. 1. Whether it is achieved separately or in conjunction with more general mining law reform, mandatory Federal registration of claims and records of required assessment work is important for sound management of the public domain. The Congress should enact legislation to impose that requirement; and the Department should consider whether it may impose such a requirement under its existing rulemak-

ing powers and management authority over the public lands.

2. Pending the implementation of mandatory registration procedures, the Department should afford facilities for voluntary Federal registration of claims by persons who wish to be assured personal notice of governmental actions possibly affecting their interests. Moreover, when clear title must be established for particular tracts of public domain during this period, fairness permits and efficiency demands that the Department adopt procedures which require the unknown owners of the claims, or the holders of unknown claims, to identify themselves and their claims before any more formal government action can be called for. Procedures for identifying claims, modeled on those specified in the Multiple Mineral Use Act of 1954 and the Surface Resources Act of 1955, should include the following:

(a) The search for claims and claimants should be limited to what can be readily discovered by visual inspection of the land, by limited inquiry in the vicinity, by listing in tract indexes, and by reference to the Department's own records and knowledge.

(b) Personal notice should be given only to those claimants thus discovered; otherwise, notice may be effected by posting the land and by appropriate publication.

(c) All persons wishing to assert the validity of claims affecting the lands in question should be required to file verified statements with the Department precisely identifying themselves, their claims, and other parties in interest.

(d) Claims not asserted within a reasonable period of time should be deemed abandoned.

B. Hearing and Review Procedures.

1. The Department should by rule require that once the Government initiates proceedings to determine the validity of mining claims located on particular tracts of public land, claimants must specify all matters necessary to establish this validity—in particular, what discovery of valuable mineral is claimed, with supporting geological and economic information. Until such matters are specified, the claimant has not established a basis for a fact-finding

hearing; failure to make adequate specification should subject the claim to summary judgment declaring its invalidity. In the administration of this rule, the Department should take measures to protect the interests of smaller prospectors, acting in good faith, who may not be financially able to provide full technical data regarding their claims. Such measures might include joint inspection and assay using government experts (once the nature and points of discovery asserted are identified and adequately defined), and reliance upon the resulting reports as adequate to support summary judgment in accordance with their conclusions of fact.

2. Because the nature and quality of his claim is a matter uniquely within his knowledge, the claimant should be made to bear the burden of going forward as well as the burden of proof in any fact-finding hearings. Moreover, the Department should make clear by rule that where such hearings prove brief and the issues of fact or law involved prove simple, the presiding administrative law judge has the authority to decide the case immediately from the bench upon conclusion of the hearing and receipt of argument, without need to await the transcript or written briefs.

3. Effectively conferring final decision-making authority upon the Board of Land Appeals risks a bifurcation of the Department's policymaking function. The Department should adopt measures that will reconcile the appropriate adjudicative role of the Board with the Secretary's policymaking responsibility.

4. The Congress should enact legislation which would help to bring the adjudicative procedures of the Department into line with usual administrative practice:

(a) By conferring on the Bureau of Land Management discovery authority commensurate with that enjoyed by most Federal agencies; and

(b) By explicitly providing for review of the final agency decision in adjudicated cases in the appropriate Court of Appeals under the Administrative Procedure Act, with "substantial evidence" review of findings of fact.

C. Rulemaking Procedures—Public Information. 1. The Department's rulemaking procedures should be improved and the availability of its information to the public increased by various means, including:

(a) Adoption of procedures providing interested parties adequate opportunity to inspect and to comment upon geological data and other Government-developed data or views relating to a pending rulemaking proposal and otherwise available under the Freedom of Information Act, 5 U.S.C. 552. This may require extension of the ordinary comment period.

(b) Reduction of the number and complexity of law-sources which must be consulted to determine governing law and authority within the Department. Matters substantially affecting the public, but now incorporated in staff manuals or other internal documents, should be included in the published regulations, and policies generated through the adjudicatory process should be codified in regulations periodically. In addition, the Bureau of Land Management should publish regularly, in the Code of Federal Regulations and in pamphlet form, a full and current description of its central and field organization, showing lines of authority, and a full and current description of its operating procedures for dealing with mining matters, including the full requirements for patent applications.

[39 FR 23043, June 26, 1974]

§ 305.74-4 Preenforcement Judicial Review of Rules of General Applicability (Recommendation No. 74-4).

(a) With increasing frequency, rules of general applicability adopted by agencies informally pursuant to 5 U.S.C. 553 are being reviewed by the courts directly, before they are applied to particular persons in adjudicative proceedings. Such review may be by courts of appeals under statutes, mostly older statutes, providing generally for judicial review or orders of specific agencies, or under recent statutes providing specifically for the direct review of rules issued by new agencies or by newly created authority. The district courts also review rules directly in the exercise of their power under the Administrative Procedure Act to review agency action not otherwise reviewable.

(b) The trend toward immediate review of agency rules has been accompanied by con-

fusion over the appropriate scope and standard of review. In particular, conceptual and practical difficulties have arisen from the use by Congress and the courts of phrases such as "hearing," "record" and "substantial evidence on the record as a whole," traditionally associated with review of orders entered after a formal evidentiary hearing, in the new and different context of pre-enforcement review of agency rules adopted informally.

(c) This recommendation, addressed to Congress, the Judicial Conference and the agencies, seeks to dispel the confusion by: (1) Stating what administrative materials should be included in the record on review and (2) clarifying the standards for reviewing the adequacy of the factual basis and rationality of rules. The recommendation accepts the present pattern of pre-enforcement review of rules and does not call for either more or less of such review. Nor does it suggest that any particular procedures should be followed by agencies in adopting rules.

RECOMMENDATION

1. In the absence of a specific statutory requirement to the contrary, the following are the administrative materials that should be before a court for its use in evaluating, on pre-enforcement judicial review, the factual basis for rules adopted pursuant to informal procedures prescribed in 5 U.S.C. 553: (1) The notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency's concise general statement or final order and any documents referred to therein.¹ References to the "record" or "whole record" in statutes pertaining to judicial review of rules adopted under sec-

¹ The court may of course limit its consideration to those materials that parties cite. Whether the agency may withhold from the parties to the judicial review proceeding or the court on the ground of confidentiality any materials otherwise called for is left by the recommendation to be decided under existing law.

tion 553 should be construed as references to the foregoing in the absence of a legislative intent to the contrary. The Conference does not assume that the reviewing court should invariably be confined to the foregoing materials in evaluating the factual basis for the rule.

2. The term "substantial evidence on the record as a whole," or comparable language, in statutes authorizing judicial review should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed by the agency whose actions are subject to the statute and, in particular, should not be taken as a legislative prescription that in rule-making agencies must follow procedures in addition to those specified in 5 U.S.C. 553.

3. The appropriate standard for determining whether a rule of general applicability adopted after informal rulemaking rests on an adequate foundation is stated in 5 U.S.C. 706(2)(A), which provides that a reviewing court must set aside action found to be "arbitrary, capricious [or] an abuse of discretion." Where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information before it (including the administrative materials described in paragraph 1), whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported.

4. Statutes providing for judicial review of rules adopted after informal rulemaking should refer only to the standards for review of such rules set forth in 5 U.S.C. 706, including the "arbitrary, capricious, [or] abuse of discretion" standard of section 706(2)(A) (but not including the "substantial evidence" standard of section 706(2)(E), which by its terms is inapplicable to such rules). Properly applied, those standards are adequate to insure appropriate judicial scrutiny of rules adopted informally. Judicial review statutes that speak in terms of review according to the standard of "substantial evidence" should be construed as establishing a standard of

review over informal rulemaking comparable to that set forth in section 706(2)(A), unless a contrary intent clearly appears.

EDITORIAL NOTE: One separate statement was filed concerning the recommendation.

[39 FR 23044, June 26, 1974]

§ 305.75-1 Licensing Decisions of the Federal Banking Agencies (Recommendation No. 75-1).

(a) Entry into banking is controlled on the Federal level by four agencies: the Comptroller of the Currency (for charters and branches of national banks), the Federal Home Loan Bank Board (for charters and branches of Federal savings and loan associations, and via the Federal Savings and Loan Insurance Corporation for account insurance for state-chartered savings and loan associations), the Board of Governors of the Federal Reserve System (for FRS membership and accompanying FDIC deposit insurance for state-chartered banks, and for branches of state member banks), and the Federal Deposit Insurance Corporation (for deposit insurance for state banks that are not FRS members, and for branches of such banks).

(b) The statutes which confer these powers of approval over entry into banking and banking markets contain sketchy standards, or none at all, defining how the administrative authorities should exercise their judgment. The statutory void has not as yet been filled by the agencies themselves; none of them has adopted comprehensive statements of policy or meaningful rules of general applicability, though recently the Federal Reserve and FDIC have taken steps in this direction.

(c) In acting upon such applications, the agencies usually do not hold hearings or issue reasoned opinions. As a consequence, little authoritative information is available concerning the policies the agencies follow in exercising their broad powers over entry into banking markets and in granting valuable authorizations to some applicants and denying them to others.

(d) Increasingly within the last two decades, these decisions—particularly those of the Comptroller—have been subjected to judicial review. The absence of adequate explanatory opinions by the agency has impeded review that is both meaningful and limited. Reviewing courts have too often been forced to choose between pro forma validation of agency action or substitution of the court's judgment for that of the agency.

(e) This recommendation, addressed to the agencies, is directed at the point of greatest initial need: the provision of expla-

nation of policies and decisions. That can be accomplished in a variety of ways, and the recommendation distinguishes between different agency roles and types of decision, in a manner intended to avoid unnecessary demands upon agency resources. Moreover, the Freedom of Information Act (5 U.S.C. 552) requires agencies to make available to the general public whatever statements of agency policy and opinions in individual cases they have prepared. This recommendation is in furtherance of those statutory objectives.

(f) Applications are sometimes, though not often, rejected on grounds that the agency believes would be substantially injurious to a bank or individual if made public. This possibility is not a justification for a general policy of non-explanation; it should not be automatically applied to shield all negative information. Occasionally, nevertheless, the agency may believe that it would be warranted in not disclosing certain information. If the information pertains to the applicant bank or group, the applicant could be afforded the option of withdrawing its request; if it pertains to an objecting bank, the ground could be stated in general terms, such as "to prevent an adverse impact on other institutions." The extent to which supporting evidence should be revealed in camera or by some other confidential method, if judicial review were subsequently sought, is left to be decided under existing law and is outside the scope of this recommendation.

(g) The present recommendation has limited reach. It is not intended to express either approval or disapproval of the present system of entry controls in banking, nor is it addressed to the extent of statutory discretion possessed by the Federal banking agencies in their licensing decisions, which is exceptionally broad and would remain so if this recommendation were fully accepted. What is now proposed is, simply, that when this broad discretion is exercised, the agencies should articulate their decisional standards and underlying policy objectives in a way that would facilitate understanding and evaluation on the merits.

RECOMMENDATION

1. *General.* The Federal banking agencies should undertake to provide a full statement of their objectives in approving or denying applications for charters, membership, or permission to establish branches, and should define in concrete terms the standards to be applied. This can be done best by the adoption of policy statements and rules of general applicability, which should be as specific as possible. To provide additional clarity and under-

standing, reasoned opinions should be issued in situations described below.

2. *Chartering authority decisions: Comptroller and Federal Home Loan Bank Board.* Charter decisions are of high importance and relatively low in number. An explanatory opinion should be furnished as a matter of course in all charter denials, since this is the most critical entry barrier; when requested, explanation of favorable action upon an application should be provided to any objecting party or to any interested Federal agency.

In the case of branch applications, the numbers are large and many approvals seem a matter of routine. Probably only a small minority of approvals, but a much larger fraction of denials, would occasion a desire or need for explanation. For branches, therefore, the comptroller and FHLBB should furnish written opinions when the agency believes the case presents issues of general importance, or when requested by an applicant, an objecting party or an interested federal agency.

3. *Secondary supervisor decisions: Federal Reserve Board, Federal Deposit Insurance Corporation, and Federal Savings and Loan Insurance Corporation.* Branch approvals by the FRB and FDIC seem well nigh automatic, no doubt because of reliance on the primary approval of other authorities, and an opinion requirement in all cases would be excessive. For branches, therefore, the FRB and FDIC should also furnish written opinions when requested or when the agency believes the case presents issues of general importance.

Membership applications may not fall wholly into the same category, though only the FSLIC has a significant rejection ratio. Written opinions should be furnished on request, which would presumably be made infrequently by others than disappointed applicants.

4. *Publications.* All four agencies should systematically collect and publish their licensing opinions in some convenient form. Depending on frequency and length, those of general importance might be included as part of monthly publications such as the *Federal Reserve Bulletin* or *Federal*

Home Loan Bank Board Journal, or as an appendix to annual reports; others might be published as a separate series and made available in public files at the agency's Washington and field offices.

[40 FR 27925, July 2, 1975]

§ 305.75-2 Affirmative Action for Equal Opportunity in Nonconstruction Employment (Recommendation No. 75-2).

(a) Executive Order 11246, which concerns equal employment opportunity, applies to all contractors with the Federal government. Pursuant to this executive order, the Department of Labor has promulgated one set of regulations prohibiting discrimination and requiring affirmative action to govern contractors in the construction industry, and another set of such regulations to govern all other contractors.

(b) A study of the application of the nonconstruction regulations to university faculty employment practices illustrates that the use of a single set of regulations for all nonconstruction employment can fail to take adequate account of important special circumstances of major employment categories. With respect to university faculty employment, for example, the regulations as applied have generated difficulties arising from failure to take account of the limited supply of qualified personnel in various disciplines, the nonquantifiability of standards for academic personnel, the diversity of institutional needs fulfilled by academic personnel (e.g., research, teaching, public service), different types of institutions (e.g., research universities, community colleges), and the concept of peer review in academic employment practices. It seems evident that difficulties of the sorts experienced in the application of the nonconstruction regulations to academic employment in higher education will be encountered in their application to other employment categories as well.

(c) The study further suggests that contract cancellation is in many cases too severe or impracticable as the primary sanction for noncompliance with equal employment opportunity regulations; in practice, cancellation is rarely used. The more common sanction, as in the field of higher education employment, is the declaration of nonresponsibility of an employer. Unlike the procedures leading to other sanctions, such as debarment of a contractor or cancellation of a contract, no opportunity for prior hearing is afforded in connection with a declaration of nonresponsibility. The provision of an opportunity for hearing before imposition of any sanction under the contract compliance program will tend to assure the fairness and reliability of admin-

istrative determinations and to encourage responsible and consistent application of policy.

RECOMMENDATION

1. The Department of Labor, in consultation with the compliance agencies, should promptly commence a review of the contract compliance program applicable to nonconstruction contractors to determine whether regulations more closely adapted to the characteristics of specific occupations or industries are required, considering especially: (1) Variations in the susceptibility of types of employment to uniform or quantifiable methods of evaluating and predicting performance and (2) variations in policies of recruitment and advancement and in other personnel practices.

2. The Department of Labor should develop a system of graduated sanctions for breach of the obligation contained in the equal employment opportunity clause of government contracts, and should seek legislation to this end as may be necessary.¹

3. A sanction, including that of declaration of nonresponsibility on equal employment opportunity grounds made prior to the award of a contract, should not be imposed except after opportunity for a hearing (whether evidentiary or informal) at which the validity of the claim of breach, or assertion of nonresponsibility, and the appropriateness of the proposed sanction may be placed in issue.

4. In performing its responsibilities for contract compliance in higher education the Department of Health, Education, and Welfare should: (a) Provide regional office staffs with uniform and clearly defined policies, (b) recruit and assign staff who are familiar with institutions of higher education for administration of the program in higher education, (c) consult widely with representatives of higher education institutions and other interested groups in developing and administering

¹In this connection the Department should consider Conference Recommendation 71-9: Enforcement of Standards in Federal Grant-in-Aid Programs, and Recommendation 72-6: Civil Money Penalties as a Sanction.

ing its compliance rules and policies, and (d) strengthen coordination of its administration of regulations applicable to higher education with other agencies having overlapping responsibilities, in particular the Equal Employment Opportunity Commission and the Wage and Hour Administration of the Department of Labor.

[40 FR 27926, July 2, 1975]

§ 305.75-3 The Choice of Forum for Judicial Review of Administrative Action (Recommendation No. 75-3).

(a) This recommendation states criteria for use by the Congress in determining the appropriate forum for judicial review of federal administrative action.

(b) The present forum for the review of most agency actions taken on formal evidentiary records is the court of appeals under specific statutory provisions. There are some exceptions. An important one concerns decisions of the Social Security Administration on claims of old-age, survivors' and disability benefits, which are reviewable in the first instance by district courts with subsequent recourse to the courts of appeals.

(c) The jurisdictional picture is less clear with respect to informal administrative action, both notice-and-comment rulemaking and non-record adjudication.

(d) Some recent statutes provide specifically for review by courts of appeals of rules of general applicability promulgated without an evidentiary hearing. There is much uncertainty, and conflicting authority, as to whether older statutes providing for direct appellate review of agency "orders" apply to such rules. In the case of agencies not subject to specific court of appeals review provisions, rules are ordinarily reviewed by district courts under the general review provisions of the Administrative Procedure Act.

(e) Orders entered after non-record adjudications by agencies whose "orders" generally are subject to court of appeals review typically are reviewed in the courts of appeals, although there is some old and more-or-less neglected authority that casts doubt on the practice. Orders of other agencies entered after non-record adjudications are reviewed in the district courts under the general review provisions of the Administrative Procedure Act.

(f) Legislation that conformed to the criteria set forth in this recommendation would not significantly alter the pattern described above but would clarify the pattern at its edges. Such legislation would eliminate the uncertainty and consequent needless jurisdictional litigation that have resulted from the ambiguity of existing statu-

tory review provisions in their application to informal agency actions, rules and orders. It would have the additional desirable effect, particularly important now because of the acute and increasing caseload pressure on the courts of appeals, of helping to avoid burdening these courts with administrative review cases that are less suitable for them than others.

(g) This recommendation rests on three basic premises. First, direct review by the courts of appeals, where feasible, is generally desirable in the interest of efficiency and economy, as respects both litigants and the judicial system. The classic case for the courts of appeals is review of agency action taken on an evidentiary record. A second premise, however, is that direct review by the courts of appeals is not necessarily rendered unfeasible by the absence of such a record; the records generated by the processes of notice-and-comment rulemaking and of informal adjudication are frequently adequate to the purpose of judicial review and, also, can usually be supplemented without the necessity of a judicial trial. The third, and qualifying, premise is that review by the courts of appeals, even when review is of a purely appellate nature or, if not so, can feasibly be conducted by the courts of appeals, is not invariably desirable. The courts of appeals, burdened by rapidly increasing caseloads that threaten the quality of their decisions, constitute a scarce resource that should be reserved, to the extent possible, for the resolution of issues of law or policy issues of major impact; administrative review cases that do not present such issues and that would not ordinarily reach the courts of appeals unless brought there initially should be assigned instead to the district courts.

(h) Before the study on which the recommendation is based was made the Conference necessarily passed upon particular questions of choice-of-forum for judicial review in connection with individual studies and the recommendations emanating therefrom. Instances are Recommendations 72-6 (court of appeals review of civil money penalties prescribed on a record); 72-7 (district court review of non-record selective service preinduction orders); 74-3 (court of appeals review of mining claims decided on a record). The Conference has not caused these recommendations to be restudied in the light of the new criteria but believes that the recommendations remain appropriate.

RECOMMENDATION

1. Adjudications based on trial-type hearings and rules required by statute to be based on a hearing with a determination on the record should gener-

ally be made directly reviewable by courts of appeals. For certain types of formal administrative action, however, initial district-court review may be appropriate in the interest of conserving the scarce and over-extended resources of the Federal appellate system. The district court should not be interposed unless the administrative action to be reviewed is of a type (a) that rarely involves issues of law or of broad social or economic impact warranting routine review by a multi-member court and (b) such that district court review would significantly reduce the workload of the appellate courts. The latter condition is met only where the class of orders to be reviewed is numerous and, if reviewed initially by district courts, would infrequently give rise to further appeal.

2. For any class of formal administrative action that, even after initial district-court review, generates a large and burdensome volume of appeals, only a small proportion of which involve legal issues or issues of broad social or economic impact, Congress should consider the advisability of making appeals discretionary or of allowing appeals only upon certification by the district court. Under a system of discretionary appeals, leave to appeal, either by the agency or by an aggrieved party, should be granted only in cases where issues of law or of broad impact are involved.

3. Orders of the Social Security Administration with respect to claims for disability, health insurance, retirement or survivors' benefits should continue to be reviewed in the first instance by district courts. If the volume of social security appeals increases as dramatically as projected, Congress should consider the advisability of placing appellate review on a discretionary basis.

4. Orders of the Department of Labor Benefits Review Board with respect to black-lung compensation claims under the Black Lung Act of 1972 are now subject to direct review by courts of appeals in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Congress should consider the advisability of providing for initial district-court review of such orders.

5. The appropriate forum for the review of rules promulgated pursuant to the notice-and-comment procedures of 5 U.S.C. 553 should be determined in the light of the following considerations:

(a) Absence of a formal administrative record based on a trial-type hearing does not preclude direct review of rules by courts of appeals because: (i) Compliance with procedural requirements of 5 U.S.C. 553, including the requirement of a statement of reasons for the rule, will ordinarily produce a record adequate to the purpose of judicial review, and (ii) the administrative record can usually be supplemented, if necessary, by means other than an evidentiary trial in a district court.

(b) Direct review by a court of appeals is appropriate whenever: (i) An initial district court decision respecting the validity of a rule will ordinarily be appealed or (ii) the public interest requires prompt, authoritative determination of the validity of the rule.

(c) Rules issued by agencies that regularly engage in formal adjudication and whose "orders" are subject by statute to direct review by the courts of appeals will normally satisfy the criteria of (b) above and in any event should be reviewable directly by the courts of appeals.

(d) Rules of other agencies that do not satisfy the criteria of (b) above should generally be reviewable in the first instance by the district courts.

6. (a) Informal administrative actions, other than rules, should generally be reviewable in the first instance by the district courts.

(b) The court of appeals is the appropriate reviewing forum for informal actions that, as a class, fulfill all of the following conditions:

(i) Typically involve issues of law or of broad social or economic impact,

(ii) Typically do not require an evidentiary trial at the judicial level to determine either the underlying facts or the grounds or evidence on which the agency based its actions; and

(iii) Are either few in number or, if numerous, would in most cases be likely to reach the appellate courts eventually even if reviewed initially by district courts. Informal orders issued by agencies that mainly engage in

formal adjudication and the formal orders of which are now subject by statute to direct review by the courts of appeals will normally satisfy these conditions and should therefore be reviewable by the courts of appeals. There is, however, at least one exception. Informal, discretionary orders of immigration officials related to deportation, but not issued as part of any formal deportation proceeding, should continue to be reviewable in the first instance by the district courts.

7. Statutes that give courts of appeals jurisdiction to review informal orders or rules should contain provisions, similar to that now contained in the Administrative Orders Review Act, 28 U.S.C. 2347, authorizing transfer of proceedings to a district court where a factual issue requiring a judicial trial is presented.

8. A Federal court which determines that it does not have jurisdiction of a judicial review proceeding should be authorized to transfer the proceeding, in the interests of justice and expedition, to a Federal court appearing to have jurisdiction.

EDITORIAL NOTE: A separate statement was filed concerning this recommendation.

[40 FR 27926, July 2, 1975]

§ 305.75-4 Procedures To Ensure Compliance by Federal Facilities with Environmental Quality Standards (Recommendation No. 75-4).

(a) The Federal Government owns or operates over 20,000 facilities, ranging from huge military establishments, national parks, and systems of prisons and veterans' hospitals to individual fish hatcheries, Coast Guard stations and research laboratories. All of these facilities are required by Federal law to comply with environmental quality standards established by national, State or local law.

(b) As part of the Federal environmental protection program, a 1973 executive order directs Federal agencies to assess their pollution control needs, develop plans for improvement and submit those plans and necessary budget requests for inclusion in the President's Annual Budget. This program has achieved significant results. Approximately \$2.4 billion has been expended over the past eight years to improve and install pollution abatement equipment at Federal facilities. Nonetheless, instances of noncompliance by Federal facilities have persisted. Moreover, there are wide variations among

the respective programs concerned with air, water, noise, solid waste and ocean dumping, in the openness and effectiveness of the procedures for securing Federal facility compliance.

(c) The Clean Air Act, the Federal Water Pollution Control Act, and the Noise Control Act each require agencies with control over Federal facilities to comply with both Federal and non-Federal pollution control standards "to the same extent (as) any person," unless otherwise exempted by statute. The Marine Protection Act requires all "persons," including Federal officials, to obtain a Federal permit before dumping waste material in the ocean. Under the Solid Waste Disposal Act, Federal agencies need comply only with the United States Environmental Protection Agency's guidelines, which are less stringent than those of some States and localities.

(d) The Federal air, water, noise control, and solid waste statutes do not establish or specifically authorize procedures for their enforcement where Federal facilities are concerned. This problem is acute when considering non-Federal environmental quality standards, which constitute the bulk of the environmental standards Federal facilities must meet, because the non-Federal efforts to impose their enforcement procedures have been challenged by Federal agencies. Two United States Courts of Appeals have reached opposite conclusions concerning the authority of States to require Federal facilities to obtain air emission control permits required of all non-Federal sources of air pollution; a third Court of Appeals has held that Federal facilities must comply with State permit requirements with respect to water quality. But any decision, even of the Supreme Court, will leave substantial procedural problems. If the authority of the States to impose their permit and other enforcement procedures upon Federal facilities is upheld, some agencies will have to comply with a multitude of different State and local procedures. Because of the insufficiencies of the statutory provisions, a result denying such authority to the States would leave only the present fragmentary and ineffective Federal procedures to ensure the compliance of Federal facilities with environmental quality standards.

RECOMMENDATION

1. (a) The Clean Air Act, the Noise Control Act and the Federal Water Pollution Control Act should be amended to vest in a single Federal agency the exclusive authority to develop and administer procedures to ensure compliance by Federal facilities with non-Federal environmental qual-

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ity standards. That agency should consider the use of emission control permits where they are not now employed.

(b) If the Congress amends the Solid Waste Disposal Act to require that Federal facilities comply with non-Federal environmental quality standards, the amendment should vest in the single Federal agency referred to in paragraph (a) the exclusive authority to develop and administer procedures for compliance with such standards by Federal facilities.

2. Procedures employed to ensure compliance by Federal facilities with State, interstate and local environmental quality standards should provide for: (i) Local public notice and notice to local officials, (ii) opportunity for a public hearing (but not for a trial-type hearing except on issues of specific fact that the agency finds may best be resolved by trial-type hearing), and (iii) authority for the presiding officer at any such hearing to make recommendations concerning compliance.

[40 FR 27928, July 2, 1975]

§ 305.75-5 Internal Revenue Service Procedures: The Audit and Settlement Processes (Recommendation No. 75-5).

[41 FR 3982, Jan. 27, 1976]

§ 305.75-6 Internal Revenue Service Procedures: Collection of Delinquent Taxes (Recommendation No. 75-6).

[41 FR 3982, Jan. 27, 1976]

§ 305.75-7 Internal Revenue Service Procedures: Civil Penalties (Recommendation No. 75-7).

[41 FR 3984, Jan. 27, 1976]

§ 305.75-8 Internal Revenue Service Procedures: Tax Return Confidentiality (Recommendation No. 75-8).

[41 FR 3985, Jan. 27, 1976, as amended at 41 FR 29655, July 19, 1976]

§ 305.75-9 Internal Revenue Service Procedures: Taxpayer Services and Complaints (Recommendation No. 75-9).

[41 FR 3986, Jan. 27, 1976]

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§ 305.75-10 Internal Revenue Service Procedures: The IRS Summons Power (Recommendation No. 75-10).

[41 FR 3987, Jan. 27, 1976]

§ 305.76-1 Exception from Mandatory Retirement for Certain Presidential Appointees (Recommendation No. 76-1).

EDITORIAL NOTE: This recommendation has become moot as a result of sec. 5, Pub. L. 95-256.

[41 FR 29653, July 19, 1976; 41 FR 30319, July 23, 1976]

§ 305.76-2 Strengthening the Informational and Notice-Giving Functions of the "Federal Register" (Recommendation No. 76-2).

The primary role of the **FEDERAL REGISTER** is the publication, as required by the Federal Register Act and the Administrative Procedure Act, of legal documents that affect people generally, such as descriptions of agencies' organization and functions, texts of substantive and procedural rules, notices of proposed rulemaking, and statements of general policy or interpretations of general applicability formulated and adopted by agencies. The Office of the Federal Register serves as an official depository for the filing of these documents, and their publication in the **FEDERAL REGISTER** provides the public with notice of their contents. Paragraphs A and B of the Recommendation seek to strengthen this informational function of the **FEDERAL REGISTER**.

The secondary role of the **FEDERAL REGISTER** is the publication of notices pertaining to adjudicatory matters. Statutory requirements and agency practices with respect to the publication of these notices conform to no pattern but vary widely among agencies and among different types of adjudicatory proceedings. Since the establishment of the **FEDERAL REGISTER**, Congress has enacted a considerable number of statutes that specifically require agencies to publish in the **FEDERAL REGISTER** notices of applications, hearings or decisions in adjudicatory proceedings. In addition, agencies have often obtained the approval of the Director of the Federal Register to publish in the **FEDERAL REGISTER** notices pertaining to adjudicatory matters despite the absence of an express publication requirement. Paragraphs C and D of the Recommendation seek to define and strengthen this notice-giving function of the **FEDERAL REGISTER**.

RECOMMENDATION

A. Preservation of Documents in the "Code of Federal Regulations." The

Administrative Committee of the Federal Register should require each agency to the maximum extent practicable to preserve in the "Code of Federal Regulations" documents of general applicability that are published in the FEDERAL REGISTER and are of continuing interest to the members of the public. Particularly, actions should be taken to the extent practicable in the following areas:

1. The Administrative Committee should act to preserve in the "Code of Federal Regulations" descriptions of each agency's organization and functions required to be published in the FEDERAL REGISTER under sections 552(a)(1) (A) and (B) of the Administrative Procedure Act. All agencies should inform the public of their organization and functions by publishing complete and informative descriptions in each year's edition of the "Code of Federal Regulations." Subsequent changes in an agency's description of its organization and functions should appear in the Rules and Regulations section of the FEDERAL REGISTER where the codification system adopted for use in the Code controls the order of publication and provides a useful finding aid for subsequent developments.

2. The Administrative Committee and the agencies should act to preserve in the "Code of Federal Regulations" those statements of basis and purpose (or portions thereof) accompanying the publication in the FEDERAL REGISTER of newly promulgated rules that are of continuing interest to members of the public. If the preservation of an agency's basis and purpose statements in successive editions of the "Code of Federal Regulations" is likely to become cumbersome, the texts of the statements prepared by that agency during each preceding year should be reprinted only once in that year's edition of the "Code of Federal Regulations," either at the end of the title or chapter assigned to the agency or in a special Code volume with statements from other agencies, so that subscribers to the Code are at least able to preserve the statements in composite, bound form. Additionally, the annual editions of the "Code of Federal Regulations" should supply the FEDERAL REGISTER citations to

pending rulemaking proceedings that affect present regulations or add new regulations.

B. *Publication in the "Federal Register" of Statements of General Policy and Interpretations of General Applicability.* Despite the requirement of section 552(a)(1)(D) of the Administrative Procedure Act that each agency currently publish in the FEDERAL REGISTER for the guidance of the public those "statements of general policy or interpretations of general applicability formulated and adopted by the agency," surprisingly few such policy statements and interpretations are in fact published in the FEDERAL REGISTER. Each agency should review its practices and take necessary measures to insure the publication in the FEDERAL REGISTER of all agency statements of general policy and interpretations of general applicability. In addition, when an agency utilizes an adjudicatory opinion or an instruction to staff for the purpose of adopting a general policy or interpretation of general applicability, it should publish in the FEDERAL REGISTER the pertinent portion of the opinion or of the instruction, or it should promptly summarize the policy or interpretation in guideline form and publish it in the FEDERAL REGISTER. These policy statements and interpretations should be published in the Rules and Regulations section of the FEDERAL REGISTER and should be preserved in the "Code of Federal Regulations" when they are of continuing interest to the public.

C. *Standards for Publication in the Federal Register of Notices Pertaining to Adjudicatory Matters.* Congress should consider the following standards in determining whether to impose new requirements for the publication of notices pertaining to adjudicatory matters and in reviewing existing publication requirements. The Director of the FEDERAL REGISTER should also observe these standards in exercising his discretionary authority to allow the publication in the FEDERAL REGISTER of notices pertaining to adjudicatory matters that are not required by law to be published. In both instances agencies should not rely solely on the publication of notices in the FEDERAL REGISTER to afford notice to interested

persons of adjudicatory matters if other forms of public notice are practicable.

1. The **FEDERAL REGISTER** should not routinely be used to publish the texts of agency orders and opinions in adjudicatory proceedings or notices of those decisions if there is no further opportunity available for interested persons to comment or otherwise to participate in the proceeding, except when such publication serves a necessary legal purpose. Statements of general applicability adopted by an agency in an adjudicatory opinion should be published in the **FEDERAL REGISTER** in accordance with paragraph B of this Recommendation. Supplementary agency publications that contain the texts of agency orders and opinions in adjudicatory proceedings should be listed in the "Code of Federal Regulations" at the head of the applicable title or chapter assigned to the agency and should be described in greater detail in the agency's regulations published in the Code.

2. The **FEDERAL REGISTER** should not be used to publish notices of applications, hearings and other adjudicatory matters unless the notices are public notices intended to inform interested members of the public who are not parties to the proceeding of the opportunity to comment or otherwise to participate in the proceeding. In addition, specific categories of public notices (for example, notices of applications or hearings under a specific statutory provision) should not be published if there is no substantial public interest in the proceedings or if the publication of the notices in the **FEDERAL REGISTER** is unlikely to inform interested persons about pending adjudicatory proceedings of which they would not otherwise receive notice.

3. The various categories of public notices of each agency should be listed and described in detail in the agency's regulations in the "Code of Federal Regulations." The descriptions should designate which public notices appear in the **FEDERAL REGISTER** and which do not.

D. *Format for Publication in the "Federal Register" of Notices Pertaining to Adjudicatory Matters.* 1. The Administrative Committee of the **FED-**

ERAL REGISTER should act to require that notices pertaining to adjudicatory matters that are published in the **FEDERAL REGISTER** adopt an appropriate public notice format. The notice that appears in the **FEDERAL REGISTER** should briefly inform interested persons of the nature of the proceeding, the agency's legal authority, the matters of fact and law asserted, and the opportunities available to comment or otherwise to participate in the proceeding and should designate an agency official interested persons may contact for additional information. The published notice should not ordinarily contain the text of any agency order or opinion or a detailed recitation of the legal or factual contentions of the agency or other parties to the proceeding.

2. If a notice pertaining to an adjudicatory matter is published in the **FEDERAL REGISTER**, it should be published as early in the proceeding as practicable (e.g., at the time an application is filed rather than solely when the agency orders a hearing on the application). An agency may also highlight specific applications or hearings where public participation is particularly important by publishing notices thereof in the **FEDERAL REGISTER** even though the agency does not publish notices of other applications or hearings under the same statutory provision.

[41 FR 29653, July 19, 1976]

§ 305.76-3 Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking (Recommendation No. 76-3).

The Conference's Recommendation 72-5 stated that in rulemaking of general applicability involving substantive rules "Congress ordinarily should not impose mandatory procedural requirements other than those required by 5 U.S.C. 553," and that "Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact." Paragraph 5 of the Recommendation recognized that agencies nevertheless may sometimes appropriately utilize such procedures for resolving issues of specific fact, and it counseled that in rulemaking proceedings of general applicability "each agency should decide in the light of the circumstances of particular proceedings whether or not to provide procedural protections going beyond" the notice-

and-comment requirements of Section 553, "such as opportunity for oral argument, agency consultation with an advisory committee, opportunity for parties to comment on each other's written or oral submissions, a public-meeting type of hearing, or trial-type hearing for issues of specific fact."

The present Recommendation enlarges upon paragraph 5 of Recommendation 72-5 by further specifying for agency consideration certain procedures going beyond notice-and-comment, and by describing some of the "circumstances of particular proceedings" that should move agencies to consider such additional procedures.

The Recommendation grows out of a study of decisions, primarily of the Court of Appeals for the District of Columbia Circuit, in which rulemaking proceedings have been remanded to agencies for additional procedures, and of the responses of the affected agencies. The Recommendation implies no view as to whether those decisions were authorized by the Constitution or relevant statutes. The Recommendation is premised, however, on the view that one can learn from the insights of judges, who on the basis of their study of records reflecting "the circumstances of particular proceedings," perceived a need for procedures in addition to notice and the opportunity for comment, and from the experience of agencies required to provide such additional procedures.

RECOMMENDATIONS

1. Agencies should afford interested persons the opportunity to participate as effectively as possible in notice-and-comment rulemaking proceedings. Therefore, in order to enlarge the opportunity for public participation and increase its effectiveness, agencies in appropriate circumstances should utilize procedures such as the following, which go beyond a single notice and opportunity to comment and supplement or particularize those listed as examples in Recommendation 72-5.¹

a. Providing from the outset for the possibility of two cycles of notice-and-comment: (i) When the agency anticipates that the issues raised by the rulemaking will be unusually complex,

or (ii) when it is in the public interest to utilize the initial notice of proposed rulemaking to give only a general description of the subjects and issues involved in the proceeding and to invite public comment upon these subjects and issues; provided that at the conclusion of the first cycle the agency may take any action within its powers. In addition an agency may at any time announce, as by an "advance notice of proposed rulemaking", that it intends to issue a notice of rulemaking, and in such announcement solicit comments and suggestions with respect to the contents of such notice.

b. Providing for a second cycle of notice-and-comment or by notice providing an opportunity for additional comment in any proceeding when comments filed in the proceeding, or the agency's response to such comments, present new and important issues or serious conflicts of data. An agency should consider the desirability of responding to comments as a means of exposing the agency's tentative views in order to enhance the usefulness of further comments by the public.

c. Incorporating in the notice of a notice-and-comment cycle a summation of the agency's current attitudes toward critical issues in the proceeding and a description of the data on which the agency relies, indicating where the data may be inspected.

d. Providing an explanation of the tests and other procedures followed by the agency and the significance the agency has attached to them, and allowing opportunity for comment thereon.²

e. Holding conferences open to the public, on adequate notice, when an opportunity for all interested groups (such as agency staff, directly affected persons, agency policymakers and public interest groups) to question one another would be effective in resolving, narrowing or clarifying the disputed issues.

f. Hearing argument and other oral presentation, when the presiding

¹This Recommendation is addressed solely to agency process prior to the final promulgation of a rule. In addition, the agency statement of the basis and purpose of the rule incorporated in the rule when it is adopted should be clear and complete and should fully and fairly inform the public as to the basis and purpose of the rule.

²This may be accomplished, for example, in a public notice or by technical reports issued or relied upon by the agency and incorporated by reference in the proceeding.

agency official or officials may ask questions, including questions submitted by interested persons.

Important circumstances tending to suggest the desirability of using such procedural devices are that: (1) The scientific, technical or other data relevant to the proposed rule are complex; (2) the problem posed is so open-ended that an agency may profit from receiving diverse public views before publishing a proposed rule for final comment; and (3) the costs that errors in the rule may impose, including health, welfare and environmental losses imposed on the public and pecuniary expenses imposed on the affected industries and consumers of their products, are significant.

2. In rulemaking proceedings subject to notice-and-comment requirements agencies should give interested persons an opportunity to indicate issues of specific fact as to which they contend that cross-examination should be considered by the agency to be appropriate. Cross-examination, where permitted, should be strictly limited as to subject and duration.

3. An agency should employ any of the devices specified in paragraph 1 or permit cross-examination only to the extent that it believes that the anticipated costs (including those related to increasing the time involved and the deployment of additional agency resources) are offset by anticipated gains in the quality of the rule and the extent to which the rulemaking procedure will be perceived as having been fair.

[41 FR 29654, July 19, 1976]

§ 305.76-4 Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (Recommendation No. 76-4).

(a) The Congress has enacted provisions for judicial review in the Clean Air Act and the Federal Water Pollution Control Act (FWPCA) that are in some respects inconsistent, incomplete, ambiguous and unsound.

(b) Courts have sometimes felt constrained to stretch these statutes to achieve sensible results. In other instances, courts seem to have ignored sensible general congressional direction in an attempt to do justice in particular cases. On yet other occasions courts have felt compelled by unclear

provisions to reach undesirable results that Congress probably did not intend.

(c) Experience under the two Acts has highlighted a variety of problems in the interpretation and application of the judicial review provisions, all of which are likely to be addressed by Congress in the near future.

(d) This series of recommendations urges that, when Congress reconsiders the judicial review provisions of the principal pollution statutes, it rationalize, alter and clarify them, guided especially by the principle that jurisdictional provisions should draw bright lines to minimize the waste and expense of litigation over whether a case has been brought in the right court. One recommendation is addressed to the Judicial Conference and calls upon the courts, pending congressional action to clarify their powers, to utilize their discretion to transfer judicial review proceedings where transfer will avoid undue duplication of litigation.

More specifically, the Conference has in view these considerations:

1. Section 509(b) of the FWPCA provides that all standards promulgated under it by the Environmental Protection Agency, including national standards, are to be reviewed in the United States Court of Appeals for a circuit in which the petitioner resides or transacts business. Under section 307(b) of the Clean Air Act, on the other hand, certain nationally applicable standards are to be reviewed only in the Court of Appeals for the District of Columbia Circuit, but the EPA's actions in approving or promulgating state implementation plans are reviewable only "in the United States Court of Appeals for the appropriate circuit." Thus the FWPCA provides for a decentralized review of national standards, whereas the Clean Air Act requires that analogous standards be reviewed only in the D.C. Circuit. This inconsistency in approach should be resolved; the advantages of expeditious and authoritative review of all national standards in the D.C. Circuit suggests that it is the FWPCA's venue provision which should be amended. All national standards under the FWPCA should be made reviewable in the D.C. Circuit. Review of all other regulations, standards and determinations that are reviewable in the courts of appeals under the FWPCA should be in the circuit containing the affected state or facility. These amendments would entirely supplant the present provisions for review in the circuit in which the petitioner resides or transacts business.

The Clean Air Act's specification of "appropriate circuit" as the venue for review of state implementation plan approvals has also created uncertainties, especially when several plan approvals are challenged on identical grounds. Although a perfect resolution is impossible, an amendment, clarify-

ing that the appropriate circuit is the one containing the state whose plan is challenged, would eliminate much of the prospect of threshold litigation over the question of which is the appropriate circuit, and would also avoid the splitting of cases into two different forums whenever local and national issues are present in the same case. The possibility of undue duplication of proceedings that might result can be met by increasing the flexibility of available transfer provisions to remove doubts about the authority of any court of appeals to transfer a case to any other court of appeals.

2. Section 304 of the Clean Air Act and section 505 of the FWPCA authorize citizen suits in the district court to require the EPA Administrator to perform "any act or duty under this Act which is not discretionary." Some district courts have accepted jurisdiction under section 304 over cases that amount to challenges to the Administrator's approval and promulgation of state implementation plans, despite the provision of section 307 for exclusive jurisdiction in the courts of appeals to review such action. The citizen-suit provisions should not furnish an alternative or premature method of review of questions that can be raised by direct review of the EPA's actions in the courts of appeals.

The proper scope of the present citizen-suit provisions is especially unclear in the context of standard-setting, where the line between failure to act and failure to act properly is dim. The difficulty of drawing such a distinction is ample reason for giving the courts of appeals exclusive jurisdiction of actions to compel or to postpone the issuance of regulations whose validity would properly be determined in a court of appeals. It is recognized that in its review of such issues a court of appeals might conclude that the administrative record requires amplification. Since courts of appeals normally do not hold evidentiary proceedings, provision should be made for prior resort or remand to the EPA (or, if that is inappropriate, to the district court) to meet that need.

To prevent unfairness from a litigant's choice of the wrong court, Congress should provide for transfer between district courts and courts of appeals of petitions and complaints filed under the Acts. The Court of Claims transfer provision provides a good model.

3. Although both Acts provide expressly for review in the courts of appeals and for citizen suits in the district courts, it remains possible in some circumstances to obtain non-statutory review under general federal question jurisdictional statutes. But the citizen-suit provisions of both Acts require the plaintiff to give the EPA 60 days' notice of the intended district-court action. Congress should make clear that where a non-statuto-

ry review action is filed alleging grounds that correspond to those appropriate for the filing of an action under such citizen-suit provisions, failure to comply with the notice requirements of those provisions will require a dismissal of the case.

4. The Clean Air Act and the FWPCA provide that certain regulations reviewable by petition to the courts of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement." Moreover, challenges to the validity of regulations must be made in the court of appeals within 30 days (air) or 90 days (water) after promulgation, unless the challenge is based "solely on grounds arising after" the statutory period. The express preclusion of review at the enforcement stage creates a highly unusual and unnecessary harsh restriction on the right to challenge the validity of a regulation to which one is subject. Congress should amend the Acts to allow the validity of a regulation to be challenged in defense to an enforcement proceeding. It should also amend the Clean Air Act to extend the time limit for filing petitions for review in the court of appeals to 60 days and, for consistency, amend the FWPCA to reduce the 90-day period for filing a petition thereunder to 60 days. Finally, the time limits in both Acts should be made inapplicable where the petitioner can show reasonable grounds for failure to file a timely petition.

5. Not every action of the EPA under the Clean Air Act or the FWPCA is made reviewable in the courts of appeals. Some of the omissions appear to be inconsistent with the general statutory plan, and corrective amendments are desirable.

6. Each of the four judicial review and citizen-suit provisions in the Clean Air Act and the FWPCA presents a different standard for who may petition for review or sue. This leads to undesirable confusion and inconsistency in the administration of the Acts.

RECOMMENDATION

A. Venue in the Courts of Appeals

1. Congress should provide for centralized review of national standards under the FWPCA, as is now provided under the Clean Air Act, by amending section 509(b) [33 U.S.C. 1369(b)] to provide for the review of all such national standards in the Court of Appeals for the District of Columbia Circuit.

2. Congress should further amend section 509(b) of the FWPCA to provide that review of regulations, standards or determinations affecting single

states or facilities be had in the circuit containing the state or facility.

3. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. 1857h-5(b)] to make explicit that the Administrator's action in approving a promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged.

4. Courts of appeals, when reviewing cases arising under the Clean Air Act or FWPCA, should utilize existing transfer powers to avoid undue duplication of proceedings, and Congress should amend the Acts or the transfer statute [28 U.S.C. 2112(a)] to remove doubts about the authority of any court of appeals to transfer such cases to any other court of appeals to avoid undue duplication and in the interest of the administration of justice.

B. Choice between District Court and Court of Appeals for Review

1. Congress should amend the citizen-suit provisions of the Clean Air Act [section 304, 42 U.S.C. 1857h-2] and FWPCA [Section 505, 33 U.S.C. 1365] to make clear that, insofar as suits against the Administrator of the EPA are concerned, these sections do not provide an alternative or premature method of review of questions that can be raised under the sections that provide for direct review of the EPA's actions in the courts of appeals [Section 307(b), 42 U.S.C. 1857h-5(b); Section 509, 33 U.S.C. 1369].

2. Congress should amend the Clean Air Act and FWPCA to provide that courts of appeals have exclusive jurisdiction of actions to compel or to postpone the issuance or revision of regulations whose validity is to be determined in a court of appeals. The amendments should provide that where there is need for the development of a factual record, prior resort or remand shall be made to the EPA or, if that is inappropriate, to the district court.

3. Congress should provide, by analogy to 28 U.S.C. 1506, for transfer between courts of appeals and district courts when a proceeding to review EPA action under the Clean Air Act or FWPCA is filed in the wrong forum.

C. Limitation of Non-Statutory Review

Congress should amend the statutes to make clear that when a non-statutory review action is filed alleging grounds that correspond to those appropriate for the filing of a citizen suit under section 304 of the Clean Air Act [42 U.S.C. 1857h-2] or Section 505 of the FWPCA [33 U.S.C. 1365], failure to comply with the notice requirements of those sections will require a dismissal of the case.

D. Raising Defenses at the Enforcement Stage¹

1. Congress should amend the Clean Air Act and FWPCA to permit the validity of a regulation to be challenged in defense to an enforcement proceeding.

2. Congress should amend section 307(b) of the Clean Air Act [42 U.S.C. 1857h-5(b)] and section 509(b) of the FWPCA [33 U.S.C. 1369(b)] to prescribe 60 days as the period within which, under both statutes, a petition for review must be filed in the courts of appeals.

3. Congress should amend the Clean Air Act and FWPCA to ensure that petitions for review of regulations may be filed after the expiration of the time limits of sections 307(b) and 509(b), when the petitioner can show a reasonable ground for failure to file a timely petition.

E. Actions Subject to Court-of-Appeals Review

1. Congress should amend section 509(b) of the FWPCA [33 U.S.C. 1369(b)] to make clear that the following actions by the EPA are reviewable in the courts of appeals:

a. Promulgation or approval of water-quality standards under section 303 [33 U.S.C. 1313].

b. Promulgation of effluent guidelines under section 304 [33 U.S.C. 1314].

¹ EDITORIAL NOTE: Paragraph D of Recommendation No. 76-4 has been superseded in part by Recommendation No. 82-7, 1 CFR 305.82-7.

c. Promulgation of regulations governing the discharge of oil or hazardous substances under section 311(b) [33 U.S.C. 1321(b)].

d. Promulgation of standards for marine sanitation devices under section 312 [33 U.S.C. 1322] or determinations that a state may completely prohibit the discharge from all vessels of any sewage under section 312(f) [33 U.S.C. 1322(f)].

2. Congress should amend the Clean Air Act to make those new-car emission standards not now reviewable under section 307(b) [42 U.S.C. 1857h-5(b)], reviewable in the courts of appeals.

F. Standing

Congress should adopt a single test of standing to govern all proceedings for judicial review under the Clean Air Act and FWPCA.

EDITORIAL NOTE: A separate statement was filed concerning this recommendation.

[41 FR 56767, Dec. 30, 1976]

§ 305.76-5 Interpretive Rules of General Applicability and Statements of General Policy (Recommendation 76-5).

(a) Agencies often explain their view of the meaning of statutes or rules by issuing interpretive rules of general applicability, and agencies indicate how they will exercise discretion by announcing statements of general policy. The Administrative Procedure Act requires that these interpretive rules and policy statements be published in the *FEDERAL REGISTER*. But the Act does not require that interested persons be given advance notice and opportunity to comment upon interpretive rules and policy declarations. Courts, however, have occasionally imposed that requirement.

(b) At times policy statements and interpretive rules are barely distinguishable from substantive rules for which notice and comment is required. For that and other reasons many agencies have often utilized the notice-and-comment procedures set forth in section 553 of the Act, without regard to whether their pronouncements fall into one category or another. This is, in general, beneficial to both the agencies and potentially affected elements of the public. Providing opportunity for comment upon interpretive rules and policy statements of general applicability, sometimes before and sometimes after their adoption, makes for greater confidence in and broader acceptance of the ultimate agency judgments. The following recommendations look toward wider volun-

tary adoption of such procedures by the agencies. Nothing here proposed would in any event alter the existing provisions of Administrative Procedure Act section 553(e), allowing any person to petition at any time for the amendment or repeal of a rule, including an interpretive rule or a statement of general policy. Moreover, the recommended procedures are not intended to apply to interpretations or policies set forth in opinions in formal or informal adjudications.

RECOMMENDATION

1. Before an agency issues, amends, or repeals an interpretive rule of general applicability or a statement of general policy which is likely to have substantial impact on the public, the agency normally should utilize the procedures set forth in Administrative Procedure Act subsections 553(b) and (c), by publishing the proposed interpretive rule or policy statement in the *FEDERAL REGISTER*, with a concise statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation. If it is impracticable, unnecessary, or contrary to the public interest to use such procedures the agency should so state in the interpretive rule or policy statement, with a brief statement of the reasons therefor.

2. Where there has been no pre-promulgation notice and opportunity for comment, the publication of an interpretive rule of general applicability or a statement of general policy, even one made effective immediately, should include a statement of its basis and purpose and an invitation to interested persons to submit written comments, with or without opportunity for oral presentation, within a following period of not less than thirty days. The agency should evaluate the rule or statement in the light of comments received. Not later than sixty days after the close of the comment period, the agency should indicate in the *FEDERAL REGISTER* its adherence to or alteration of its previous action, responding as may be appropriate to significant comments received. An agency may omit these post-adoption comment procedures when it incorporates in the interpretive rule or policy statement a declaration, with a brief state-

ment of reasons, that such procedures would serve no public interest or would be so burdensome as to outweigh any foreseeable gain.

[41 FR 56769, Dec. 30, 1976]

§ 305.77-1 Legislative Veto of Administrative Regulations (Recommendation No. 77-1).

Congress has by statute occasionally required that certain agency actions be subject to Congressional approval or disapproval before they became effective. Several proposals have now been advanced which would apply this procedure to all substantive rules issued pursuant to the notice-and-comment procedures of 5 U.S.C. 553 (which are not subject to 5 U.S.C. 556 and 557). These proposals typically would provide that if either house of Congress disapproved a proposed rule within a specified period, such as 60 days, it would not take effect.

The Conference believes that this kind of legislative veto would not further the ability of Congress to direct agency policy; moreover, it would bring about undesirable changes in the rulemaking process and in relationships among the agencies, Congress, and the courts.

1. Agencies. Legislative veto proposals contemplate postponing the effective date of most agency rules for two months beyond the present statutory period of thirty days that must elapse between their publication in the *FEDERAL REGISTER* and their taking effect. This additional period is prescribed so that Congress may have opportunity to exercise the power of review. The volume of existing agency rulemaking and the technical or noncontroversial nature of many rules suggest, however, that few proposed rules would in fact receive specific Congressional attention. Nevertheless the operation of the great mass of rules, whether or not actually considered by Congress, would be postponed without corresponding benefit and often with unfortunate public consequences. In instances when Congress did undertake review, it would risk engaging in piecemeal examination of particular rules, in isolation from an agency's program as a whole, and without benefit of the experience and specialized knowledge that had shaped the elements of that program. Of great concern is the possibility that Congressional review of administrative agencies' rules would significantly diminish the importance of the procedures now prescribed by law to assure public participation in rulemaking. Rules that survive active legislative review are likely to be based upon negotiations with Congressional units rather than upon the information, expression of opinion, research materials, and background experience that shaped the agency's policy.

2. Congress. Legislative review of substantive rules would increase the workload of Congress substantially. Review of complex, technical rules would be difficult, time consuming, and often impracticable. Yet, in the belief that each agency's work product would have to undergo later scrutiny by Congress or its committee staffs, Congress might be more ready even than at present to delegate power in broad terms and to avoid specificity and precision in formulating legislative policies that guide agency discretion. Piecemeal review, moreover, might create a misleading impression that Congress has endorsed by implication whatever it has not explicitly disapproved. Were that impression to become widespread, Congress might be deemed to have accepted a responsibility of unforeseen dimensions.

3. Courts. A procedure for Congressional review of agency rules may also imply legislative ratification of rules not disapproved by Congress. If legislative approval is inferred from inaction by Congress under the proposed procedure, then the scope of judicial review may be reduced without provision of an adequate substitute. Existing constraints on agency rulemaking discretion would therefore be lessened in a manner not intended by Congress.

The objectives of a generic requirement of legislative review of administrative rules can be realized by careful delineations of basic Congressional policy, by particularized statutes addressed to specific issues, and by Congressional hearings focused on review of agency policy rather than on details. Careful attention to appointments and appropriations constitutes a further effective means of maintaining Congressional oversight of agencies' use of delegated power.

RECOMMENDATION

The Conference urges that Congress should not, in general legislation or as as a routine practice, provide for prior submission of agency rules for Congressional review and possible veto.

[42 FR 54251, Oct. 5, 1977]

§ 305.77-2 Judicial Review of Customs Service Actions (Recommendation No. 77-2).

EDITORIAL NOTE: This recommendation has been largely implemented by Pub. Laws 95-410, 96-39 and 96-417.

[42 FR 54251, Oct. 5, 1977]

§ 305.77-3 Ex parte Communications in Informal Rulemaking Proceedings (Recommendation No. 77-3).

In Recommendation 72-5 the Conference expressed the view that, generally, agency rulemaking is preferably carried out through the simple, flexible and efficient procedures of 5 U.S.C. 553. That statute requires publication of notice of proposed rulemaking and provision of opportunity for submission of written comments; additional procedures may be utilized by the agencies as they deem necessary or appropriate. Recommendation 72-5 counseled that Congress ordinarily should not impose mandatory procedural requirements going beyond those of section 553 in the absence of special reasons for doing so. In Recommendation 76-3 the Conference amplified its 1972 recommendation by suggesting ways in which agencies might usefully supplement the minimum procedures required by section 553 in appropriate circumstances.

The primary purposes of rulemaking procedures under section 553 are to enhance the agency's knowledge of the subject matter of the proposed rule and to afford all interested persons an adequate opportunity to provide data, views, and arguments with respect to the agency's proposals and any alternative proposals of other interested persons. Section 553 procedures, in some instances, also serve to provide the basis for judicial review. To the extent consistent with all of these purposes, the agencies should have broad discretion to fashion procedures appropriate to the nature and importance of the issues in the proceeding, in order to make rules without undue delay or expense. Informal rulemaking should not be subject to the constraints of the adversary process. Ease of access to information and opinions, whether by recourse to published material, by field research and empirical studies, by consultation with informed persons, or by other means, should not be impaired.

While the foregoing considerations militate against a general prohibition upon ex parte communications in rulemaking subject only to section 553, certain restraints upon such communications may be desirable. Ex parte communications during the rulemaking process can give rise to three principal types of concerns. First, decision makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; second, significant information may be unavailable to reviewing courts; and third, interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication. In the context of section 553 rulemaking, the first two problems can be alleviated by placing

written communications addressed to a rule proposal in a public file, and by disclosure of significant oral communications by means of summaries or other appropriate techniques. The very nature of such rulemaking, however, precludes any simple solution to the third difficulty. The opportunity of interested persons to reply could be fully secured only by converting rulemaking proceedings into a species of adjudication in which such persons were identified, as parties, and entitled to be, at least constructively, present when all information and arguments are assembled in a record. In general rulemaking, where there may be thousands of interested persons and where the issues tend to be broad questions of policy with respect to which illumination may come from a vast variety of sources not specifically identifiable, the constraints appropriate for adjudication are neither practicable nor desirable.

RECOMMENDATION

In rulemaking proceedings subject only to the procedural requirements of section 553 of the APA:

1. A general prohibition applicable to all agencies against the receipt of private oral or written communications is undesirable, because it would deprive agencies of the flexibility needed to fashion rulemaking procedures appropriate to the issues involved, and would introduce a degree of formality that would, at least in most instances, result in procedures that are unduly complicated, slow and expensive, and, at the same time, perhaps not conducive to developing all relevant information.

2. All written communications addressed to the merits, received after notice of proposed rulemaking and in its course, from outside the agency by an agency or its personnel participating in the decision should be placed promptly in a file available for public inspection.

3. Agencies should experiment in appropriate situations with procedures designed to disclose oral communications from outside the agency of significant information or argument respecting the merits of proposed rules, made to agency personnel participating in the decision on the proposed rule, by means of summaries promptly placed in the public file, meetings which the public may attend, or other techniques appropriate to their cir-

cumstances. To the extent that summaries are utilized they ordinarily should identify the source of the communications, but need not do so when the information or argument is cumulative. Except to the extent the agencies expressly provide, the provisions of this paragraph and the preceding paragraph should not be construed to create new rights to oral proceedings or to extensions of the periods for comment on proposed rules.

4. An agency may properly withhold from the public file, and exempt from requirements for making summaries, information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552.

5. Agencies or the Congress or the courts might conclude of course that restrictions on ex parte communications in particular proceedings or in limited rulemaking categories are necessitated by considerations of fairness or the needs of judicial review arising from special circumstances.

[42 FR 54253, Oct. 5, 1977]

§ 305.78-1 Reduction of Delay in Rate-making Cases (Recommendation No. 78-1).

(a) The time regulatory agencies take to make decisions is widely criticized. Rate cases—that is, cases in which an agency must consider whether to approve a proposed schedule of charges for particular services—aptly illustrate the need to explore ways of making sound decisions more quickly. Because rate cases differ in kind and complexity, as well as in their immediate and future consequences, subjecting the decision process to unvarying time limits would be unwise. Nevertheless, steps that will reduce delays without jeopardizing the agencies' ability to bring relevant considerations to bear on the decision of each case are urgently needed.

(b) Delay in the ratemaking process occurs chiefly at two points:

(1) Developing the underlying data, a task shared by the proposer of rates, the agency staff, and other participants in the proceedings, and

(2) Writing and issuing opinions to support the agency's decision when finally made.

(c) The present recommendation urges utilizing rulemaking procedures to achieve a single resolution of issues that would otherwise arise in many separate cases. In this respect the recommendation builds upon the Conference's previous conclusion (Recommendation 73-6) that licensing agencies should adopt generic procedures to resolve "environmental issues common to more than one application and appropriate for across-the-board treatment." If this were done in ratemaking matters, both of the main areas of delay noted above could be narrowed.

(d) The present recommendation also reaffirms the Conference's earlier judgment (Recommendation 72-4) that "[s]ettlement of rate proceedings by agreement among the parties . . . is appropriate and desirable if the agency . . . is in a position to determine that the disposition is in the public interest." Implicit in the 1972 recommendation was the recognition, here explicitly stressed, that the interests of unrepresented groups must be considered before a settlement is approved. Increased emphasis upon settlement of cases should reduce the need for formal decisions and opinions.

(e) The recommendation calls on ratemaking agencies to collect data systematically rather than episodically as cases arise. Computer-based data collection and processing programs have the potential to improve both the speed and quality of rate determinations in some agencies. These techniques should be emulated whenever the mass or complexity of statistical material limits the prompt resolution of issues.

(f) The purpose of this recommendation is to improve ratemaking proceedings for the benefit of those regulated as well as for the benefit of the users of regulated services, by adding to the efficiency of ratemaking agencies. It is not intended that adoption of this recommendation in anyway expand the scope of regulation, have any adverse competitive impact, or add unduly to the costs of producing information.

RECOMMENDATION

A. USE OF RULEMAKING FOR GENERIC ISSUES

1. An agency charged with responsibility for setting or approving rates should identify policy issues that may arise repetitively and that may be appropriate for a generalized determination instead of individualized judgment. Examples might be deciding the proper treatment of tax credits, the proper use of automatic adjustment clauses, the cost of equity capital, the desirability of differential rates for residential and business customers, and the propriety of "lifeline" rates for poor or low volume users. Ratemaking agencies should, as to issues of that type, commence proceedings that

will eventuate in rules adopted and published in accord with the requirements of the Administrative Procedure Act. The determinations reflected in the published rules should be binding in subsequent individual cases, but the agency should by rule provide that parties may seek different treatment upon a compelling showing that application of the general rule is not appropriate.

2. A ratemaking agency must of course reexamine its generic determinations when pertinent technological or economic circumstances change or when freshly available information indicates the need for further thought. Reexamination should ordinarily take place in another rulemaking proceeding. Where, however, the agency acts to reexamine in whole or in part a rule embodying a generic conclusion, individual rate proceedings that involve an issue then under restudy should ordinarily go forward to a decision without awaiting the conclusion of the new rulemaking proceeding; the parties should be permitted to litigate the issue in the individual case unless completion of the rulemaking proceeding is imminent and decision of the individual case would therefore need to be only briefly postponed.

B. SYSTEMATIC COLLECTION OF DATA

1. An agency charged with responsibility for setting or approving rates should design means of accumulating on a continuing, periodic basis the kind of data that must now be submitted in support of rate change requests. These include, for example, general cost information, capital needs projections, data on actual receipts and estimates of growth of demand. The information should be obtained through restructuring of existing reporting formats in order to avoid increasing the regulated firm's paperwork burden. Agencies should assure that the information sought is likely to be of direct and focused relevance to forthcoming rate proceedings, and that the agency expects to make prompt use of the data. Accumulated information should be accessible to the public, to the extent permitted by law.

2. To assure efficient use of the information received the agencies must

employ more sophisticated data processing techniques than are now in general use. The models adopted by the Commerce Department's experimental technology incentives program ("regulatory analysis model") and the Federal Energy Regulatory Commission ("regulatory information system") constitute helpful examples.

C. SETTLEMENT OF RATE CASES

Agencies charged with ratemaking responsibility should encourage the parties to controverted rate cases to settle them by agreement. Negotiated settlements must, however, take account of public interests other than those of the immediate disputants. Procedures to assure this may vary with circumstances and the agency. Authority to approve or disapprove settlements must be retained as a safeguard against unwise or improper settlements.

[43 FR 27507, June 26, 1978]

§ 305.78-2 Procedures for Determining Social Security Disability Claims (Recommendation No. 78-2).

(a) For at least two decades the Social Security Administration's hearings and appeals processes, particularly those for determining disability claims which account for 90 percent of all hearings, have been the subject of study, debate, and critical comment. Suggestions for improvement of these processes abound. It has been proposed that social security hearings be exempted from the formal hearing requirements of the Administrative Procedure Act; that administrative law judges not be used to decide these cases; that the decisions be made not after "hearing," but after "examination" by a panel of experts; that the hearing process be retained, but made fully adversary; that one or another level of agency review be abolished; that judicial review be precluded or shifted to magistrates or to an article I court; that the substantive standard be changed, or at least sharpened by the development of regulations or precedent decisions.

(b) The National Center for Administrative Justice has recently concluded the most comprehensive study yet undertaken of the social security hearings and appeals system. In developing the present recommendations, the Administrative Conference has reviewed and built upon that study, the general conclusion of which is that, given existing information, the more dramatic proposals for

reform of the system are inadvisable. While the problems that have been identified by others do in various degrees infect the social security hearings and appeals system, the difficulties are not so overwhelming that the proposal of a markedly different system is required. Hence the recommendations that follow are for the most part interstitial and conservative. Their purpose is to prescribe improvements while reinforcing sound practice.

RECOMMENDATIONS

A. DECISIONAL BODY

1. The use of administrative law judges appointed in conformity with the Administrative Procedure Act to decide disability claims should be continued.

2. The Bureau of Hearings and Appeals (BHA) possesses and should exercise the authority, consistent with the administrative law judge's decisional independence, to prescribe procedures and techniques for the accurate and expeditious disposition of Social Security Administration claims. After consultation with its administrative law judge corps, the Civil Service Commission, and other affected interests, BHA should establish by regulation the agency's expectations concerning the administrative law judges' performance. Maintaining the administrative law judges' decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies underlying the Social Security Administration's fulfillment of statutory duties.

B. EVIDENTIARY DEVELOPMENT

1. Although evidence must sometimes be collected after the administrative law judge hearing, prehearing development often may be necessary for an informed and pertinent exchange at the hearing. Administrative law judges should not therefore adopt an invariant policy of post-hearing development, but should develop the record during the prehearing stage whenever sound discretion suggests that such development is feasible and useful.

2. The Bureau of Hearings and Appeals should experiment with wider

use of prehearing interviews as a means for case development and in order to provide increased opportunity for grants of benefits without the necessity of a hearing. Due regard should be paid to the convenience of the claimants and to the need for a suitable record of such interviews.

3. Better use should be made of treating physicians as sources of useful information. In this regard, Bureau of Hearings and Appeals should make more frequent use of available, standard-form questionnaires to treating physicians. And when the Bureau of Hearings and Appeals finds that consulting physicians' reports conflict with evidence supplied by treating physicians, it should inform claimants of the opportunity to have their treating physicians comment in writing on the consulting physicians' reports.

4. The Bureau of Hearings and Appeals should make better use of claimants as sources of information by: (a) Providing them with available State agency reasons for denial; (b) providing notice of the critical issues to be canvassed at the hearing; and (c) engaging in careful and detailed questioning of the claimant at the hearing.

5. In the absence of regulations structuring the administrative law judge's discretion when evaluating vocational factors, administrative law judges should take official notice at the hearing of vocational facts that can be established by widely recognized documentary sources or on the basis of agency experience.

6. When vocational experts are called as witnesses they should be examined in detail concerning: (a) The claimant's job-related skills; (b) the specific jobs that exist for persons with the claimant's skills and functional limitations; and (c) the number of regional location of jobs that the claimant can perform.

7. Claimants should not be asked to waive their rights to see evidence developed after the hearing.

8. Congressional inquiries should be processed by Bureau of Hearings and Appeals offices in a manner that will avoid any suggestion of preferential treatment of claimants either in the scheduling or outcome of hearings.

C. MONITORING, MANAGEMENT, AND
CONTROL OF THE HEARING PROCESS

[43 FR 27508, June 26, 1978]

§ 305.78-3 Time Limits on Agency Actions
(Recommendation No. 78-3).

1. The Appeals Council should exercise review on the basis of the evidence established in the record before the administrative law judge. If a claimant wishes to offer new evidence after the hearing record has been closed, petition should be made to the administrative law judge to reopen the record. Where new evidence is offered when an appeal is pending in the Appeals Council, the Appeals Council should make that evidence a part of the record for purposes of the appeal only if a refusal to do so would result in substantial injustice or unreasonable delay.

2. The Social Security Administration should devote more attention to the development and dissemination of precedent materials. These actions include: (a) Regulatory codification of settled or established policies; (b) reasoned acquiescence or nonacquiescence in judicial decisions; (c) publication of fact-based precedent decisions; (d) periodic conferences of administrative law judges for discussion of new legal developments or recurrent problems.

3. The Bureau of Hearings and Appeals should continue an aggressive quality assurance program to identify errors, determine their causes and prevent their recurrence.

D. JUDICIAL REVIEW

When seeking a "Secretary-initiated" remand, pursuant to section 205 of the Social Security Act, the Secretary should state the reasons for each request.

E. REPRESENTATION

1. Bureau of Hearings and Appeals offices should fully inform claimants prior to the hearing of the availability of counsel and lay representation and of the means by which they may obtain counsel or representation in their local area on a fee or no-fee basis.

2. The Bureau of Hearings and Appeals should assist and cooperate with appropriate organizations in the development of training programs for attorneys and lay representatives.

(a) Eliminating undue delay in administrative procedures has long been a public concern. Congress addressed the problem in general terms in the Administrative Procedure Act in 1946. Section 6(a) of the original Act required each agency to conclude any matter presented to it "with reasonable dispatch." Section 10(e)(A) of the Act authorized a reviewing court to enforce this command by compelling agency action "unlawfully withheld or unreasonably delayed." Although these two sections (now codified as section 555(b) and section 706(1) of Title 5) contain enforceable prohibitions against unlawful or unreasonable delay, they have contributed little to the reduction of delay. Because what constitutes unlawful or unreasonable delay is not readily ascertainable, courts have afforded relief from administrative dilatoriness only occasionally and in egregious cases. Courts have also recognized that the present statutory provisions are too general to deprive agencies of the broad discretion they need to allocate limited resources among competing demands for official attention.

(b) Frustration over the inability of agencies and courts to speed the course of administrative proceedings has occasionally led Congress to adopt a somewhat mechanistic approach to the problem. In recent years Congress has with increasing frequency enacted statutory provisions that require particular agencies to complete adjudicatory or rulemaking proceedings within prescribed periods of time. In these instances, the statutory limits are stated in terms of specific numbers of days or months; the statutes also identify the categories of agency proceedings that are subject to the prescribed schedules. Congress evidently expects that if it establishes a deadline for agency action, the affected agency will meet that deadline, or will at the least complete its assigned statutory duty more promptly than it would otherwise have done.

(c) Congressional expectations that statutory time limits would be effective have remained largely unfulfilled. There has been a substantial degree of noncompliance with all the statutory time limits studied. Agency officials often view statutory timetables as unrealistically rigid demands that disregard the agency's need to adjust to changing circumstances. Practical experience at diverse agencies lends support to this appraisal.

(d) Statutory time limits tend to undermine an agency's ability to establish priorities and to control the course of its proceedings. Such limits also enable outside interests to impose their priorities on an

agency through suit or threat of suit to enforce them. When asked to enforce statutory time limits, courts have recognized that an agency's observance of the prescribed limits may conflict with other requirements of law (e.g., the right of interested persons or parties to a full and fair hearing) or with the requirements of sound decisionmaking. Judges have, therefore, treated the enforcement of statutory time limits as a matter lying within their own equitable discretion despite the precisely measured language of the statutes.

(e) A recent task force study for the Senate Committee on Governmental Affairs¹ has concluded that particularized timetables or deadlines established by individual agencies to govern their own proceedings can be useful tools for reducing delays and are preferable to seemingly more rigid legislative prescriptions. This finding fully accords with those of the study underlying the present recommendation of the Administrative Conference.

RECOMMENDATION

1. Reasonable timetables or deadlines can help reduce administrative delay. Generally, it is preferable that such limits be established by the agencies themselves, rather than by statute.

2. Before determining to impose statutory time limits for the conduct of agency proceedings, Congress should give due consideration to the alternative of requiring the agency itself to establish timetables or guidelines for the prompt disposition of various types of proceedings conducted by it. It may also require that significant departure from agency adopted timetables be explained in current status reports.

3. Whether or not required to do so by statute, each agency should adopt time limits or guidelines for the prompt disposition of its adjudicatory and rulemaking actions, either by announcing schedules for particular agency proceedings or by adopting regulations that contain general timetables for dealing with categories of the agency's proceedings.

4. Congress ordinarily should not impose statutory time limits on an

agency's adjudicatory proceedings. Statutory time limits may be appropriate, however, when the beneficial effect of agency adjudication is directly related to its timeliness, as may be true in certain licensing cases or in clearance of proposed private activity where a delayed decision would deprive both the applicant and the public at large of substantial benefit. If Congress does enact time limits, for cases of any type, it should recognize that special circumstances (such as a sudden substantial increase in caseload, or complexity of the issues raised in a particular proceeding, or the presence of compelling public interest considerations) may justify an agency's failure to act within a predetermined time. Statutes fixing limits within which agency adjudication must be completed should ordinarily require that an agency's departure from the legislative timetable be explained in current status reports to affected persons or in a report to Congress.

5. Congress ordinarily should not impose statutory time limits on rulemaking proceedings. Purely as a practical matter, modern rulemaking proceedings are too complex and varied, and involve too many stages, to permit fixing unyielding time frames for agency decisionmaking. Strict time limits, moreover, may foreclose the use of procedural techniques that can be valuable in enhancing the degree of public participation and insuring completeness of information.² Congress should therefore enact statutory time limits applicable to rulemaking only when it can be relatively specific about what it expects the agency to do, and when it intends the agency to have relatively little discretion in doing it. Congress may appropriately indicate by statute the time within which an agency should respond to individual requests to commence rulemaking, but it should avoid combining that time limit with a restriction on the discretion the agency otherwise enjoys to commence or not commence proceedings and to establish priorities for its rulemaking activities.

¹Senate Committee on Governmental Affairs, 95th Cong., 1st sess., IV Study on Federal Regulation: Delay in the Regulatory Process, 132-52 (1977).

²See, for example, Administrative Conference Recommendations 76-3, 72-5, and 77-3.

6. If Congress does impose a statutory time limit on agency decisionmaking, whether in adjudicatory or rule-making matters, it should be attentive to the need for revision. A time limit considered desirable at the outset may prove to have been unrealistic because it was based on incomplete information. If realistic at the time of enactment, the limit may cease to be so with the passage of time. Statutes imposing time limits therefore should provide for periodic reconsideration by the Congress or grant the agency authority to revise the limits under standards established by the Congress.

7. If a statutory time limit is imposed, Congress should expressly state whether affected persons may enforce the time limit through judicial action and, if so, the nature of the relief available for this purpose. In cases where the time limit is intended only as a norm by which the agency's performance is to be measured, a requirement that the agency report deviations from the time limit to Congress may be a desirable means of assuring oversight of its performance.

[43 FR 27509, June 26, 1978]

§ 305.78-4 Federal agency interaction with private standard-setting organizations in health and safety regulation (recommendation No. 78-4).

(a) Many Federal agencies have authority to issue mandatory health or safety regulations relating to products, materials, processes, practices or services that may be the subjects of voluntary standards prepared by non-governmental organizations. Non-governmental standards, though not legally enforceable, have in fact gained wide acceptance and a high degree of observance. Many voluntary standards are developed, reviewed, and periodically revised by technical committees of such non-governmental organizations that follow open and regular procedures, including a process for considering and attempting to resolve negative comments. Membership on technical committees may be broadly based and "balanced" in an effort to assure representation of varying points of view and avoidance of domination by a single interest. Some standards-developing organizations provide a review mechanism to assure compliance with prescribed procedures and an appropriately balanced membership. Standards developed by private organizations that generally observe such procedures, or under the Department of Commerce voluntary stand-

ards program, are frequently referred to as "voluntary consensus standards," and are the subject of this recommendation. This recommendation is directed toward the manner in which agencies should interact with non-governmental organizations that develop voluntary consensus standards and the manner in which agencies should utilize such standards for health and safety regulation.

(b) Not all voluntary standards are developed through the consensus process just outlined. Other kinds of voluntary standards—for example, those developed by trade associations or other organizations through nonconsensus procedures—may be valuable for regulatory use by Federal agencies, but are not treated by this recommendation. Also, the recommendation does not address the development of international standards.

(c) Members of technical committees that develop voluntary consensus standards often have a wealth of technical knowledge and expertise that agency staffs do not possess. Agency participation in or cooperation with those technical committees may result in the development of standards that adequately address considerations of health or safety more efficiently and effectively than if the agency seeks independently to formulate standards. The fact that a standard has been developed by an organization that uses consensus processes, however, does not of itself assure that it is appropriate for regulatory use. For example, some standards were developed at a time when less open procedures were followed, or when the state of relevant knowledge was less advanced, than at present. Some standards were developed without relevant accident and injury information. Some organizations and committees preparing voluntary consensus standards may not always have an adequate representation of varying interests; in particular, there are problems in obtaining effective representation of and participation by certain significant interests, especially consumers, employees, small business, and certain noneconomic interests that agencies may be charged with protecting.¹ Moreover, the process of seeking consensus followed by some standards-developing organizations often may create standards that are acceptable for business interests but may not be suitable for regulatory use.

¹The Conference is aware that the concept of representing identified "interests" in private standards-developing organizations is a complex one, involving considerations such as what may be identifiable as an interest, its relevancy, its internal homogeneity, its capacity to be represented by knowledgeable spokesmen, and its political strength.

(d) Consequently, the appropriateness of particular voluntary consensus standards for use by an agency in the development of mandatory health or safety regulations should be determined on a case-by-case basis. Of course, before adopting any mandatory standard, the agency should identify a need for doing so.

(e) Questions have been raised as to the possible applicability of the Federal Advisory Committee Act to technical committees and standards-developing organizations. The FACA should not apply to the technical committees and standards-developing organizations contemplated by this recommendation, which ordinarily are privately organized and operated primarily for purposes independent of advising the Federal government. It would be injurious to the operation of such organizations, and to their willingness to cooperate with Federal agencies, to apply to them certain provisions of the FACA which assume Federal sponsorship and control of committees subject to the Act. Examples include the vesting of authority in Federal employees to approve and terminate meetings and to approve the agenda of meetings, and of authority in the General Services Administration to conduct annual reviews which can result in recommendations to restructure or even abolish committees. The recommendation calls upon Congress to amend the FACA to make explicit that it does not govern the technical committees and standards-developing organizations here addressed. Of course, several principles reflected in the FACA—such as balanced membership and open decision-making—represent important criteria for agencies to take into account when considering the use of standards developed by such organizations (see paragraph 6(c)).

(f) The recommendation that follows is limited to agency interaction with standards-developing organizations and use of voluntary consensus standards in the context of regulation of health or safety.² The recommendation may nevertheless be significant in relation to setting standards for other purposes. For example, in conservation of energy and resources, environmental issues, and formulation of test methods and definitions. Agencies that use voluntary

consensus standards in contexts other than health or safety regulation are urged to consider the recommended measures set forth below and to follow them to the extent appropriate. However, the recommendation is not intended to have application to the use of voluntary standards in government procurement, as to which less elaborate procedures may be appropriate in many cases.

RECOMMENDATION

COORDINATION AND COOPERATION WITH STANDARDS-DEVELOPING ORGANIZATIONS

1. An agency having authority to issue mandatory health or safety regulations should draw on the knowledge and information available in active technical committees that develop relevant voluntary consensus standards, and should interact in accordance with this recommendation with technical committees that follow procedures that are substantially in accord with the criteria of paragraph 6(c).

(a) To the extent that staff resources permit, the agency should arrange for an appropriately qualified employee to serve on each technical committee in which the agency has a significant interest. An employee so serving should serve as a representative of the agency rather than in an individual capacity or as a representative of some other designated "interest."³ Where separate representatives of several agencies may result in an imbalance on the committee, the agencies should seek to agree on a common representative or on the attendance of some agency personnel as observers. The representative's function should be to act as liaison to the committee, to monitor and participate in its standards-writing activities, and to provide information and communicate the views of the agency relative to the standards being developed and the procedures followed by the technical committee. The representative should have no authority to vote or to bind

²The concept of "regulation of health or safety" for purposes of this recommendation is not intended to encompass all agency functions aimed at health and safety concerns. For example, the recommendation does not deal with requirements relating directly to the qualifications or conduct of individuals engaged in the performance of professional services in areas of health or safety, or regulations that impose preconditions on eligibility for Federal funding programs.

³This paragraph should not be construed as indicating disapproval of the common present practice of permitting agency employees serving with the consent of their agencies on technical committees in their individual capacities or as representatives of some other designated "interest" rather than as agency representatives.

the agency to any specific proposal. An agency employee who has participated in a technical committee's development of a standard may thereafter participate in the agency's decision-making process by providing information and advice, but should not otherwise participate in making the agency's decision on whether to adopt or to revise that standard unless the agency has no other personnel with the requisite knowledge and expertise.

(b) When considering whether to modify an existing mandatory health or safety standard or to develop a new mandatory standard, the agency should normally ask an appropriate technical committee, if an active one exists, to consider the matter and the data bearing on the possible need for a modification or a new standard. This should be done before the agency independently publishes a modification or new standard as a proposed regulation. The agency should announce the referral in an advance notice of proposed rulemaking which describes the interaction between the agency and the technical committee and explains how the views of the interested public may be communicated to the committee. If the technical committee promptly takes steps to develop an appropriate new voluntary consensus standard or to modify a relevant voluntary consensus standard in a manner acceptable to the agency, or presents an appropriate existing standard, the agency may incorporate the standard into its regulations, or may determine that governmental action is not needed (see paragraph 7). If, however, the committee does not respond promptly or adequately and the agency determines that regulatory action is needed, the agency should proceed independently to develop a mandatory standard. In determining whether to request the assistance of a technical committee or to defer development of a regulation pending action by a technical committee, the agency should take into account the need for prompt development of the standard and whether committee consideration may be obtained promptly.

(c) The relationship between the agency and the technical committee should be a cooperative one, and the

agency should not seek to dominate the committee.

(d) In their published rulemaking notices relating to voluntary consensus standards, agencies should describe their interactions with the technical committees involved.

(e) Congress should amend the Federal Advisory Committee Act to state explicitly that the technical committees and standards-developing organizations of the sort addressed by this recommendation, which are privately organized and operated primarily for purposes independent of advising federal agencies, are not within the definition of "advisory committee" for purposes of that Act.

2. In appropriate cases the agency should provide its available technical information, data on health or safety concerns, and other relevant material and information to the technical committee. The agency may also provide financial and other support for the committee when such action is legally permissible and is in furtherance of the agency's mission and responsibility.

3. If an active relevant technical committee exists, an agency undertaking to develop standards "in-house" should coordinate its efforts with the committee as outlined in paragraphs 1 and 2, unless the agency has strong reasons to believe the committee can make no useful or timely contribution to the development of an adequate standard.

4. Each agency should, as a matter of general policy, regularly review standards or revisions proposed by technical committees active in the areas of regulatory concern of the agency, and should advise such committees on a regular and informal basis whether the proposed standards and revisions appear to be consonant with the agency's regulatory responsibilities.

5. Agencies should adopt and publish regulations or policy statements implementing the procedures outlined in paragraphs 1 through 4 and describing the manner in which agency representatives are to be designated and the authority they are to possess.

USE OF EXISTING VOLUNTARY CONSENSUS
STANDARDS IN REGULATION

6. Agencies with authority to issue health or safety regulations should consider the use of existing relevant voluntary consensus standards in developing mandatory standards. Voluntary consensus standards should be considered with due caution and on a case-by-case basis. Ordinarily, standards which embody judgmental factors should receive greater scrutiny when being considered by agencies for adoption into regulations than standards which specify nomenclature, basic reference units, or methods of measurement or testing, and which are primarily empirical in their formulation. In evaluating a voluntary consensus standard each agency should consider the following factors:

(a) The apparent suitability of the voluntary consensus standard for use as a mandatory standard, including:

(i) The problems addressed by the standard and changes in the state of knowledge since the standard was prepared or last revised;

(ii) The extent to which the standard has been complied with, and the reasons for any noncompliance;

(iii) The extent of injury, accident, or illness known to have resulted from products, materials, processes, practices or services that have conformed with the standard;

(iv) The clarity and detail of the standard's language;⁴

(v) The extent to which the standard establishes performance rather than design criteria, where feasible;

(vi) The extent to which a newly developed standard, under which little experience exists, appears adequately to address the hazards considered by the developers of the standard or known to the agency; and

(vii) The enforceability of the standard.

(b) The nature of the agency's statutory mandate to develop health or safety regulations and the consistency of the provisions of the voluntary consensus standard with that mandate.

⁴The wording of a standard may contain too much detail as well as too little.

(c) The adequacy of the procedures followed by the organization preparing the standard to assure that:

(i) The membership of the technical committee represents a broadly based and balanced array of relevant interests, including, where appropriate, representatives of consumers, labor, small business, and other affected groups, and no single interest has a dominating influence on the committee;

(ii) Reasonable notice that a proposed standard is being considered is given to interested persons and groups;

(iii) Interested persons and groups have an opportunity to participate in the deliberations and discussions relating to the standard;

(iv) Prompt and careful consideration is given to minority points of view and objections to the standard;

(v) Standards are approved by considerably more than a simple majority vote of the technical committee, although unanimity is not necessarily required;

(vi) An adequate opportunity for review is afforded to assure that fairness is protected and that dissenting views are given full consideration;

(vii) Adequate records are maintained to document that the established procedures were actually followed and that the views presented were duly considered in accordance with those procedures; and

(viii) The entire process is open to public scrutiny and review.

(d) The availability of documentation adequately describing the costs and benefits, the rationale for and method of arriving at the critical requirements of the standard, and other factors actually considered by the technical committee in developing or revising the voluntary consensus standard.

(e) The number of negative voters and the interests they represent.

(f) Possible anti-competitive effects that may arise from the use of the voluntary consensus standard.

7. Subject to the procedural requirements of 5 U.S.C. 553 or other relevant statutes, a voluntary consensus standard that appears to be partially or wholly suitable for use as a regulation

may be adapted by an agency in various ways.:

(a) If the voluntary consensus standard adequately addresses the questions of health or safety and is being substantially complied with by the affected industry, the agency may decide to take no further regulatory steps, or, alternatively, to adopt the standard into its regulations (see paragraph (f) below), and direct its primary regulatory efforts elsewhere. If, under these circumstances, the agency decides to take no further regulatory steps, it should publish that decision and the reasons therefor in the *FEDERAL REGISTER*. The agency should thereafter review periodically the continued adequacy of the standard and the extent of compliance with it by the affected industry.

(b) If the voluntary consensus standard adequately addresses the questions of health or safety, but there has not been substantial compliance with the standard by the affected industry, or if the industry is so scattered and diffuse that it is difficult to ascertain compliance, then the agency should adopt the standard into its regulations. Where the standard is new, the agency may defer a decision for a reasonable period to observe the effects of the standard.

(c) If the voluntary consensus standard adequately addresses the questions of health or safety but the language of the standard lacks the clarity or detail appropriate for a regulatory standard, then the agency should accept the substantive provisions of the voluntary consensus standard and seek to develop the needed clarity or detail by working with the technical committee. Only if this is unsuccessful or impractical should the agency alone reformulate the standard. In evaluating whether a voluntary consensus standard is appropriately detailed, the agency should consider the extent to which other regulatory authorities have adopted the standard and have then succeeded in enforcing it.

(d) If the voluntary consensus standard does not adequately address the pertinent questions of health or safety, the agency should seek to develop an adequate standard with the assistance of the relevant technical

committee by following the procedures described in paragraph 1(b).

(e) Agencies should consider the "regulatory guide" approach as a means of effectively making use of voluntary consensus standards. A "regulatory guide" is a formal declaration by the agency that compliance with designated portions, or all, of a voluntary consensus standard will be considered an acceptable method of compliance with a general mandatory standard appearing in either the governing statute or the agency's regulations. When taking this approach, the agency should suitably publicize its decision and reasons therefor.

(f) The agency may adopt a voluntary standard into its regulations either by placing the text of the standard in the regulations, or, preferably, by incorporating the standard by reference pursuant to 1 CFR Part 51.

8. Each regulatory agency must take special care to avoid needless inconsistencies between voluntary and mandatory standards, as well as to remain abreast of technological change. An agency that has adopted a voluntary consensus standard into its regulations must therefore be aware of and must promptly review all later revisions initiated by the technical committees. If a revision is consistent with the agency's regulatory responsibilities, the agency should promptly proceed under its rulemaking authority to amend its prior standard by adopting the latest revision. Such procedures should provide for coordinated consideration by all agencies that have adopted the standard.

REVISIONS OF STANDARDS THAT HAVE BEEN INCORPORATED BY REFERENCE BY MORE THAN ONE AGENCY

9. Where a voluntary consensus standard has been incorporated by reference by two or more agencies, the Office of the Federal Register should develop, and implement in the form of a regulation, a procedure by which such agencies may elect in advance to have all proposed changes in such voluntary consensus standard reviewed pursuant to the following procedure:

(a) A notice of proposed rulemaking, prepared by or under the direction of

the Office of the Federal Register, should be published under the name of each electing agency in accordance with the notice and comment requirements of 5 U.S.C. 553, so that each agency's standard can be revised promptly in accord with revisions subsequently approved by the promulgating organizations. The notice should also direct that all comments on the proposed revision be sent to each electing agency as well as to the promulgating organization. The Office of the Federal Register should coordinate the distribution of comments if the number of electing agencies is large.

(b) Each electing agency should promptly review each proposed revision to the referenced standard in the light of the comments received, and should then determine whether or not to adopt the revision when it has been finally approved by the promulgating organization. Adoption of the revised standard should be formally announced and should be officially published, without further public opportunity to comment.

10. In order to implement paragraph 9, the Office of the Federal Register should promptly ascertain all incorporations by reference of voluntary standards that have been made in the Code of Federal Regulations and are currently in effect.

[44 FR 1357, Jan. 5, 1979]

§ 305.79-1 Hybrid Rulemaking Procedures of the Federal Trade Commission (Recommendation No. 79-1).

EDITORIAL NOTE: The preamble is omitted pursuant to § 304.2(a) of this chapter. It may be found in the FEDERAL REGISTER.

RECOMMENDATION

1. The Commission should include in the initial notice of proposed rulemaking a description of the theories and materials which it then considers relevant to the rulemaking, together with appropriate references to the rulemaking record, including materials both supporting and opposing any proposed rule. The notice should indicate with reasonable specificity both the issues upon which the Commission seeks comment and information, and the

kinds of evidence or information that are likely to be valuable to the Commission's resolution of the issues.

2. At the time the notice of proposed rulemaking is published, the Commission, consistent with its present policy, should place in the rulemaking record, and index, the staff investigative report recommending rulemaking (which should contain the staff's analysis of the issues, a summary of the information considered significant by the staff, and the methods of analysis used by the staff) and all relevant information in the possession of the staff. Information exempt under the Freedom of Information Act may be withheld. Similarly, all relevant material developed by the staff after the notice is published should be promptly placed in the rulemaking record, and indexed.

3. To the extent feasible, and as early as practicable in the proceeding, the Commission should provide guidance to participants concerning suggested methods for the marshalling and presentation of information.

4. The Commission, to the extent feasible, should promote (but not require) the use of standard methods for the marshalling and presentation of information with respect to issues commonly recurring in trade regulation rulemaking proceedings.

5. In conducting investigations which may lead to trade regulation rulemaking, the Commission should experiment with techniques for eliciting increased information and views from the public, including the use of advance notices of proposed rulemaking with opportunity for public comment and meetings or conferences open to the public on adequate notice. The Commission should assure that its staff solicits the views of affected interest groups during the course of the investigation, including groups that might not otherwise participate.

6. Many issues that arise in the course of formulating rules pursuant to section 18 of the Federal Trade Commission Act require, or can benefit from, the contributions of disciplines other than law. The Commission should continue its efforts to assure appropriate use, at all stages, of experts whose disciplines are relevant

to consideration of the proposed rule, including economists, statistical analysts and consumer research specialists.

7. To avoid burdening the rulemaking record, the Commission, consistent with its present policy, should require that the staff maintain, separately from that record, a public file of related documents, collected and generated by it, that the staff, pursuant to procedures established by the Commission, has determined not to be relevant.

8. Proper handling of rulemaking records can greatly assist public participation in proceedings, reduce delay, and enhance the quality of decisions. The Commission should continue and intensify its efforts to improve public and staff access to the rulemaking record through upgrading of record management practices, storage and retrieval technologies, copying and microfilming capability, and record indexing and organization. The Commission should ensure that all materials in the rulemaking record are indexed as they are received, and that adequate facilities are provided for members of the public to inspect, copy, and work with the record.

9. The use of subpoenas should be restricted to the investigation conducted by the Commission staff to develop information relevant to the rulemaking, including information both supporting and opposing the rule. Once a hearing has been noticed, the subpoena power should be used sparingly, and, once a hearing has been commenced, should be used only with the approval of the Presiding Officer upon a showing of need.

10. In lieu of a discovery practice, the Commission should provide by rule that at a hearing or within a reasonable time thereafter the Presiding Officer, on his own motion or on that of the Commission staff or any other participant, may request the staff or any other participant at that hearing to clarify, elaborate or support any oral or written presentation then or previously made by such participant. The rule should also provide that failure to comply with such a request may result in the drawing of adverse inferences with respect to the presentation,

or a reduction in the weight to be given to the presentation.

11. If a person appealing from the Commission's initial denial of a Freedom of Information Act request asserts that the information sought is desired for use in a pending rulemaking proceeding, the agency official handling the appeal should not affirm the denial on the basis of an exemption in that Act without first obtaining the views of the Presiding Officer in the proceeding as to the utility of that information, except where withholding the information is required by law. The Commission should adopt such amendments to its Freedom of Information Act procedures as may be necessary to assure this consultation.

12. As a general practice the Commission, after the close of the first period of submission of written comments, should conduct a legislative-type hearing, following which it should determine whether there appear to be "disputed issues of material fact it is necessary to resolve." If it so determines, such issues should be designated with specificity, and a further hearing in accordance with section 18(c) of the Federal Trade Commission Act, should be held for the purpose of resolving them.

13. An oral hearing can serve any or all of at least four somewhat separate functions: (1) Fact gathering; (2) fact testing; (3) assessment of the views of different segments of the public; and (4) clarification of positions and exchange of views on policies, values or desirable lines of inquiry. The fact testing function is performed in the section 18(c) hearing referred to in Paragraph 12, above. The legislative hearings should be designed according to which of the other three functions is believed likely to predominate. For example, the clarification of positions and exchange of views on policies, values or desirable lines of inquiry may best be furthered by such informal devices as roundtable or panel discussions.

14. The statutory phrase "disputed issues of material fact it is necessary to resolve" should be understood to mean only those issues (1) which are capable of being resolved as matters of fact, and (2) whose resolution is essen-

tial to the evaluation or formulation of a rule.

15. Cross-examination may not be necessary on a designated disputed issue of material fact. However, if the Commission determines to limit or deny cross-examination on a designated issue, it should state the basis for its decision.

[44 FR 38817, July 3, 1979]

§ 305.79-2 Disputes Respecting Federal-State Agreements for Administration of the Supplemental Security Income Program (Recommendation No. 79-2).

[44 FR 38823, July 3, 1979]

§ 305.79-3 Agency Assessment and Mitigation of Civil Money Penalties (Recommendation No. 79-3).

(a) The civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies. Most regulatory offenses punishable by civil penalties involve adverse social consequences of private business activity. The motivational impact of these penalties depends in large part on the certainty of imposition and uniformity of amount, although some cases may require individualized tailoring to the circumstance of the offender so as to remove the economic benefit of the illegal conduct. Other civil penalties may also serve a secondary function of compensating society for the harm caused by unlawful conduct.

(b) Recommendation 72-6 urged that the advantages of civil money penalties would be best achieved through an "administrative imposition system" in which the agency would be empowered to adjudicate the violation and impose the penalty after a trial-type hearing, subject to "substantial evidence" judicial review. Such a system, it was stated, would avoid the delays, high costs, and jurisdictional fictions inherent in the traditional and most common system of imposing civil money penalties by a court in a civil action initiated on behalf of the agency by the Department of Justice.

(c) Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil money penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized.

(d) Experience has shown that agencies play a crucial role and exercise broad discretion in the administration of civil penalty programs, whether or not the statute in question authorizes an administrative imposition system. Agencies possessing such au-

thority have found it efficient to try to resolve cases before the formal hearing stage, through settlement and negotiation. Those agencies not possessing administrative imposition authority operate under a wide variety of statutes: some make no express reference to an agency role in the penalty process, while others confer on the agency only a power to "assess" or to "mitigate" penalties, thereby expressly or implicitly reserving to the respondent the right to seek a subsequent de novo fact-finding hearing by the court in a collection proceeding. Agencies typically exercise their statutory authority to "mitigate" in resolving contested penalty assessments prior to the initiation of formal enforcement action. In these recommendations the term "mitigation" refers to any informal process of resolving a contested initial penalty assessment.

(e) Whatever the statutory framework, the enforcing agency typically makes the initial assessment, and provides a process for mitigation of the penalty. Thus, both where there exists administrative imposition authority and where such authority does not exist, agencies and respondents customarily utilize these initial assessment and mitigation processes to resolve the great majority of civil money penalty cases without reaching the stage of formal administrative adjudication or court collection proceeding.

(f) These informal processes for the initiation and termination of civil penalty proceedings represent an area of previously unstudied and largely discretionary agency action. Appropriate standards and structures for the exercise of such discretion are needed to improve the consistency, efficiency and openness of agency assessment and mitigation processes.

(g) The recommendations that follow focus on: (1) The need for agencies to develop standards for determining penalty amounts, (2) agency procedures for initially assessing penalties, (3) agency mitigation procedures, and (4) the use by agencies of evidentiary hearings to impose civil penalties where such a procedure, though not required by statute, might result in a limited scope of judicial review.

RECOMMENDATION

A. STANDARDS FOR DETERMINATION OF PENALTY AMOUNT

1. Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts for individual cases. In establishing standards, agencies should specify the factors to

be considered in determining the appropriate penalty amount in a particular case. To the extent practicable, agencies should specify the relative weights to be attached to individual factors in the penalty calculation, and incorporate such factors into formulas for determining penalty amounts or into fixed schedules of *prima facie* penalty amounts for the most common types or categories of violation. A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection. Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit realized from or the harm caused by illegal activity should be utilized.

2. Agencies should periodically evaluate the continuing effectiveness of their penalty standards. Such evaluations should be based upon the results of compliance surveys and internal audits of agency assessment and mitigation decisions as well as data on the nature and frequency of violations routinely generated by the agency's enforcement program.

3. Agencies should make such standards known to the public to the greatest extent feasible through rulemaking or publication of policy statements. Such an approach is especially desirable where adjudications that produce written decisions are rare.

4. Agencies should collect and index those written decisions made in response to mitigation requests or after agency assessment hearings, and make such decisions available to the public except to the extent that their disclosure is prohibited by law. Whenever a respondent cites a previous written decision as a precedent for the agency to follow in the respondent's case, the agency should either do so, distinguish

the two cases, or explain its reasons for not following the prior decision.

B. INITIAL ASSESSMENT OF PENALTIES

1. Agencies should give adequate written notice to the respondent of the factual and legal basis for, and amount of, the penalty assessment.

2. Agencies should not mechanically assess variable civil money penalties at the statutory maximum if reliable evidence in their possession indicates the presence of mitigating factors. Nor, if they possess such evidence, should agencies assess at the statutory level fixed penalties which are subject to an express administrative "mitigation" authority.

3. The greater the degree to which an agency decentralizes its penalty assessment authority, the more it should structure the exercise of that authority by the use of highly specific standards. Agencies should not ordinarily delegate discretionary authority to assess civil money penalties to investigative personnel unless the delay inherent in review by an independent assessment official would materially impair the effectiveness of the enforcement process.

C. MITIGATION OF PENALTIES

Respondents in civil money penalty cases have a right to a trial-type hearing at either the administrative or judicial level. It is nevertheless desirable that agencies establish fair and economical procedures whereby respondents may informally contest the initial assessment of civil penalties without the necessity of going forward to trial-type hearings. These procedures should be governed by the following principles:

1. Agencies should provide the respondent with a right to reply in writing to a penalty claim.

2. Agency staff should not refuse a reasonable request to discuss a penalty claim orally. But an informal conference need not be built into the process except in those categories of cases where the use of written communications is likely to prove inadequate because of such factors as the unsophistication of violators or the prevalence of factual disputes.

3. Agencies should consider providing an opportunity for administrative review of a decision denying a request for mitigation.

4. Agency decisions on mitigation requests should be in writing and should be accompanied by a brief indication of the grounds for the decision.

5. In regulatory programs typically involving the imposition of small penalties, agencies may appropriately rely most heavily on readily ascertainable standards of liability, fixed schedules of prima facie penalty amounts for the most common types of categories of violations, and highly objective inspection procedures. Opportunity for mitigation should be narrowly confined and mitigation requests entertained only if in written form.

6. In regulatory programs typically involving the imposition of large penalties, agencies may appropriately provide an opportunity to a respondent to present a request for mitigation, orally or in writing, request an oral conference thereon, receive a written decision, and submit a written petition for review of such decision or for compromise of such claim at a higher agency level.

D. EVIDENTIARY HEARINGS

As expressed in Recommendation 72-6, it is desirable that agencies be given express authority to employ the procedures of adjudication on the record pursuant to the APA, 5 U.S.C. 554-557, for the imposition of civil money penalties. Where its statute does not provide for such procedure but confers upon the agency authority to "assess" or to "mitigate" a penalty, particularly if the agency is required to conduct a "hearing," the agency should consider establishing such procedures by regulation, especially where by doing so a de novo proceeding upon judicial review could be avoided. Where such a hearing procedure has in fact been observed by the agency, and the statute does not provide for de novo judicial proceedings, the court should ordinarily utilize a limited scope of review of such agency action imposing civil money penalties.

[44 FR 38824, July 3, 1979]

§ 305.79-4 Public Disclosure Concerning the use of Cost-Benefit and Similar Analyses in Regulation (Recommendation No. 79-4).

(a) Federal agencies must frequently weigh competing health, safety, resource management, environmental, economic, and other societal interests when seeking to achieve a prescribed statutory objective. Wise decision-making presupposes that the potential benefits and costs of the actions under consideration will be identified, will be quantified if feasible, and will be appraised in relation to each other. To give structure to the exercise of this responsibility, agencies sometimes use "cost-benefit" or similar analytic approaches to organize available information to determine the consequences of possible courses of action in terms of their costs, risks and benefits. Such techniques seek to display the projected net effects of alternative courses of action and, when properly used, can assist the decision-maker in deciding which of the alternatives is most likely to produce a desired result.

(b) The following recommendation seeks to promote openness in the decision-making process, to ensure that agencies' analytic methods are sound and that their assumptions are known, so as to enhance public confidence in the soundness of conclusions finally reached. The recommendation is not intended to promote or to discourage the use of any single kind of analysis as a framework for agency decision-making, since this choice is normally a matter of agency discretion. The choice of analytic technique may depend on several factors, including the technical complexity of the problem, the magnitude of the impacts, the time frame for agency action, and the extent to which quantification is possible for the specific costs and benefits to be considered. Any analysis, of course, should be viewed as an aid to rational decision-making, and not as an end in itself. The intent of the recommendation will be served by giving the public adequate advance notice of the agency's proposed methodologies, either generically or by means of special notice in a particular proceeding.

RECOMMENDATION

1. Agencies, as general policy though not necessarily by binding rule, should adopt the practice of addressing, in their public notices of particular proceedings in which cost-benefit or similar analyses are to be used, the following points:

a. Any statutory or other legal requirements pertaining to or affecting

the agency's conduct of cost-benefit or similar analyses in the proceeding.

b. The particular analytic technique to be followed by the agency (e.g., cost-benefit analysis, cost-effectiveness analysis, qualitative or non-numerative balancing), with a description of the method, including an identification of any analytic models preliminarily determined to be used.

c. Any factual assumptions or preliminary findings of the agency to be utilized in the analyses.

d. The agency's techniques for assessing and revealing uncertainties in its quantitative estimates, and making explicit the range of error associated with particular quantitative estimates.

e. The agency's methods for evaluating intangible costs and benefits, for discounting future costs and benefits, and for taking account of distributional effects arising under the selected methodology, to the extent such issues are involved in the analyses.

f. The stages of the proceeding at which the cost-benefit or similar analyses will be conducted and the results considered.

g. The extent and nature of public participation in the design, conduct, and evaluation of the cost-benefit or similar analyses.

h. The extent and manner in which the public is to be accorded access to assumptions and information used in the analyses.

A statement of the weight given the cost-benefit or similar analyses, and a description of any revisions of assumptions or preliminary findings, should be included in the final agency determination and made available to the public.

2. Where a pattern of recurring decisional problems exists for which a particular analytic technique is appropriate, the agency should consider adopting a generic regulation or policy statement describing the use of that technique with respect to those problems. Agencies that have varied statutory functions may suitably formulate separate regulations or policy statements for different areas of statutory responsibility. Generic regulations or policy statements so adopted may permit the use of different techniques on an ad hoc basis where the agency

determines that to be necessary. Any such regulations or policy statements should address the points listed in paragraph 1.

[44 FR 38826, July 3, 1979; 44 FR 47755, Aug. 14, 1979]

§ 305.79-5 Hybrid Rulemaking Procedures of the Federal Trade Commission—Administration of the Program to Reimburse Participants' Expenses (Recommendation No. 79-5).

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. 93-637, which established procedures for the Federal Trade Commission's promulgation of trade regulation rules, also authorized the Commission to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in those proceedings. The statute (15 U.S.C. sec. 57a(h)(1)) provides that the Commission may reimburse the expenses of

Any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole and (B) who is unable effectively to participate in such proceedings because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings.

The present Recommendation is addressed to relatively technical questions that have arisen in connection with the Commission's administration of this expense reimbursement program, and not to the issue of whether a reimbursement program is desirable. Since the Commission has completed only three Magnuson-Moss rulemaking proceedings, assessments of the value or the overall impact of this program cannot yet be made. The Conference does anticipate that these larger questions will be addressed in its final report on Magnuson-Moss rulemakings at the Federal Trade Commission.

The Commission, lacking specific statutory guidance and the benefit of other agencies' experience, progressed slowly, through trial and error over a two-year period, in developing its practice for administering its expense reimbursement program. The efforts of the Commission in this regard are more fully described in the report on which this recommendation is based, and merit consideration by other agencies establishing such programs. The Commission's present system of administration appears to implement faithfully and efficiently the reimbursement program established by the stat-

ute, and the conclusions embodied in the recommendations set forth below are drawn from an examination of its experience.

RECOMMENDATION

1. The Conference recommends that the Federal Trade Commission, in its implementation of the expense reimbursement program established by the Magnuson-Moss Act, continue to observe the following principles, which in large part reflect the Commission's current practice.

(a) Interested members of the public should be given an opportunity to comment on proposed regulations and guidelines for administering any expense reimbursement programs.

(b) The availability of funding should be set forth in the principal agency documents announcing the initiation of a proceeding, such as published notices of proposed rulemaking and press releases. The announcements should advise where further information on the funding program can be obtained. In addition, affirmative steps, such as direct notification of industry organizations, consumer groups, and other voluntary associations likely to be interested, should be taken to inform potentially interested members of the public of the availability of reimbursement funds. Lay-language booklets and brochures explaining the funding program and the procedures for obtaining reimbursement should be prepared and distributed.

(c) Filing dates for reimbursement applications should be established and announced well in advance. Since, however, participatory needs or desires may change by reason of the evolving nature of rulemaking proceedings, applications filed after these dates should be considered to the extent feasible.

(d) Applications for reimbursement should be acted on expeditiously in order to allow applicants adequate time to prepare for participation in the proceeding.

(e) Advance payments to recipients should be available where necessary to allow adequate preparation for participation.

(f) Responsibility for granting or denying applications should not be given to personnel in the office within the

agency that has direct responsibility for developing the staff position in the proceeding for which reimbursement is sought. However, these persons and others familiar with the proceeding (including presiding officers) should give their views to the persons with responsibility for reimbursement decisions on such matters as the relevance of the applicant's proposal, the applicant's interest in the proceedings, and the relationship between the applicant's proposal and the views and information expected to be otherwise presented in the proceeding. Wherever feasible, those with responsibility for reimbursement decisions should also be given access to experts, who are independent from any office within the agency that has direct responsibility for developing the staff position in the proceeding, on matters such as survey design and other research activities proposed by an applicant.

(g) When the character of an applicant as a representative organization is important to the decision to authorize reimbursement, the persons with responsibility for reimbursement decisions should consider the nature of the relationship—e.g., whether the applicant receives contributions from members or constituents, whether the applicant has a record of advocating similar positions with apparent member or constituent approval and whether the applicant advises its members or constituents of the position it is taking or has taken in the proceeding. The agency should also require the recipient to advise its members or constituents of its position.

(h) It should be recognized that a legislative standard which limits reimbursement to applicants who cannot afford to pay the costs of participation involves consideration of the applicant's priorities and other spending decisions, its prospects for other funding, and similar questions.

(i) Applicants should be advised in writing of the reasons for grant or denial of their applications. All advisory letters should be indexed and made publicly available.

(j) Programs for auditing the performance of reimbursed entities, including both an examination of their use of funds received and an assess-

ment of the quality of their work product, should be established. Sufficient resources should be allocated to ensure that audits are completed on a timely basis, so that supplemental or subsequent funding decisions can be informed by the results of the audits.

(k) An expense reimbursement program can serve several broad purposes—such as broadening the sources of the information presented (or developed by cross-examination) in a proceeding, improving the quality of the information in the record of a proceeding, and providing for participatory democracy by encouraging the expression of public views. The Magnuson-Moss Act does not specify which of those objectives are to predominate in a reimbursement decision. The degree of emphasis placed on one or another of these purposes can lead to different decisional criteria. The agency should specify those purposes that it recognizes and the factors that it will consider in determining whether a reimbursement application might further those purposes.

2. The Conference recommends the principles set forth in Paragraph 1 for the consideration of agencies establishing expense reimbursement programs for rulemaking proceedings, and, as applicable, for the consideration of the Congress, if it were to formulate a statutory program for reimbursing the expenses of participants in rulemaking proceedings.

3. A congressionally-established expense reimbursement program, if one were to be created, should expressly provide for the funds and staff positions necessary to implement the program, including provisions for administration, outreach activities, and financial and quality-control audits.

4. If the Congress were to establish an expense reimbursement program, it should specifically authorize the agency to make advance payments to funded participants if the agency does not clearly have that authority.

[45 FR 2307, Jan. 11, 1980]

§ 305.79-6 Elimination of the Presumption of Validity of Agency Rules and Regulations in Judicial Review, as Exemplified by the Bumpers Amendment (Recommendation No. 79-6).

EDITORIAL NOTE: The preamble is omitted pursuant to § 304.2(a) of this chapter. It may be found in the FEDERAL REGISTER and in the 1984 edition of the Code of Federal Regulations.

RECOMMENDATION

1. Congress should not enact the so-called Bumpers Amendment to section 706 of the Administrative Procedure Act or, by any similar legislation, at this time alter or reverse any presumption of validity that attaches to agency rules or regulations.

2. An across-the-board judgment that judicial deference to agency expertise or to an agency's interpretation of its statutory mandate is never warranted would be unwise, and Congress should not enact legislation precluding such deference.

[45 FR 2308, Jan. 11, 1980]

§ 305.79-7 Appropriate Restrictions on Participation by a Former Agency Official in Matters Involving the Agency (Recommendation No. 79-7).

Restrictions on post-employment activities of former Government employees may be necessary in order to protect the Government's interest in confidential information made available to its employees, to guard against the appearance of conflict of interest on the part of its employees, and to minimize the possibility that a departed employee might be able to exert undue influence on the decisions of his former colleagues. However, such restrictions impose burdens on departing employees and, to the extent they make public employment less attractive, they burden the Government itself. Consequently, such restrictions should not be drawn more broadly than necessary to deal with the dangers realistically presented.

RECOMMENDATION

1. The problem of post-employment activities of former Federal employees is too complicated, and the distinctions between permissible and impermissible conduct too fine, for fair and effective enforcement by criminal sanctions in most cases. The primary

enforcement tool for 18 U.S.C. 207 should be the administrative remedies provided by subsection 207(j), with criminal penalties reserved for clear-cut and egregious violations.

2. Section 207 of Title 18 of the United States Code should be amended to limit the restrictions on post-employment activities to the following:

(a) The present permanent bar (18 U.S.C. 207(a)) on representation of a private party in any "particular matter involving a specific party or parties" in which the employee participated "personally and substantially" on behalf of the Government should be retained. However, there should be no restriction on representation, except as provided in paragraph 2(b), with respect to other matters such as those which were pending under the employee's official responsibility but as to which he had no personal and substantial participation.

(b) The present one-year "cooling off period" (18 U.S.C. 207(c) and (d)) on personal advocacy by former high-level personnel before their former agency is a reasonable compromise and should be retained. The one-year ban should reach only personal attempts to influence the agency, not "aiding or advising" private colleagues or clients, or obtaining information from the agency.

(c) Agencies should be authorized to impose, with the concurrence of the Office of Government Ethics, additional restrictions based on their particular needs, but the proposed amended section 207 should preempt the rules of professional organizations or courts imposing additional post-employment restrictions.

3. Regardless of what action Congress takes on the above proposals, the disqualification of a former employee to act in a matter ordinarily should not extend to his firm or organization. Instead, the former employee should be barred from both personal participation in the matter and receiving compensation for anyone else's work done on it. An affidavit that the former employee is thus "screened" should be submitted by a partner in the firm, not as a basis for government approval, but to assure that the firm has in fact recognized the issue and

taken steps to deal with it. A court should retain its authority to decide that the circumstances in a particular case require a broader disqualification. In considering whether to do so, it should give special weight to the agency's view as to whether the "screening" arrangement affords adequate protection to its interests.

[45 FR 2309, Jan. 11, 1980]

§ 305.80-1 Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Recommendation No. 80-1).

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. 93-637, established special procedures for the adoption of trade regulation rules by the Federal Trade Commission. The Act also created a program for the reimbursement of the expenses of participants in trade regulation rulemaking who qualify for funding under criteria set forth in that statute.

Recommendations 79-1 and 79-5, adopted by the Administrative Conference in June and December of 1979, respectively, dealt with the Federal Trade Commission's implementation of the statute through the hearing stage of the rulemaking proceeding, and with the Commission's administration of the expense-reimbursement program. This recommendation supplements the two previous recommendations and completes the Administrative Conference's report, to the Congress required by section 202(d) of the Magnuson-Moss Act (as amended by Pub. L. 95-558).

This recommendation, and the reports on which it is based, address the following topics: (1) the procedures used by the Federal Trade Commission in the posthearing stage of Magnuson-Moss rulemaking; (2) the value of Magnuson-Moss Act procedures generally, and (3) the effects of the expense-reimbursement program.

A. Post-hearing Procedures in Trade Regulation Rulemaking By the Federal Trade Commission

The post-hearing stage of Magnuson-Moss rulemaking is complex and involves the following steps: preparation of the Presiding Officer's report; preparation of the rulemaking staff's report, with recommendations for a rule; opportunity for public comment on those reports; Bureau of Consumer Protection review, including the revision of staff's recommendations for a rule and the preparation of a summary of the "post-record" comments; oral presentations to the Commission by rulemaking participants;

consideration of a final rule by the Commission; preparation of the statement of basis and purpose to accompany the final rule, and, finally, publication of the final rule and statement of basis and purpose in the *FEDERAL REGISTER*.

Under even the best of circumstances, this would be a lengthy process. However, in most proceedings studied, the FTC and interested persons had to contend, in addition, with massive, poorly-organized records generated during earlier, unfocused prehearing and hearing stages. See the preamble to Recommendation 79-1 for a description of the conduct of those stages. Consequently, the post-hearing stage of Magnuson-Moss rulemaking has been protracted. In the eight proceedings to reach the Commission for final action by April of 1980, the average time from the end of the oral hearing to the first Commission meeting to consider the rule was more than 27 months. In the three proceedings ending with promulgation of a final rule, the average time from the first Commission meeting to consider the rule to publication in the *FEDERAL REGISTER* was an additional 8.5 months.

The massive, poorly-organized records in most of the early Magnuson-Moss rulemakings are symptomatic of a basic problem observed in the FTC's trade regulation rulemaking proceedings: that is, the failure of the FTC to recognize that effective implementation of the Magnuson-Moss Act requires even more emphasis on procedural and substantive structuring than agencies have traditionally used for informal rulemaking under 5 U.S.C. 553. Instead, the appropriate substantive structuring—the focusing and narrowing of the issues—often did not take place until late in the post-hearing stage of the proceedings, and, in many instances, not until the very end of the administrative process. The FTC Commissioners' general lack of involvement in the process until the very end, and the absence of any "feedback" from them to staff and interested persons during most of the process, further contributed to the problem of lack of structure. As a result, public input—by means of rebuttal, "post-record" comments and oral presentations—was not focused narrowly on issues or information of significance to the Commissioners.

In addition to greater intermediate structuring or narrowing of the issues by the Commissioners, there should also be more emphasis on structure at the end of the proceeding because the issues in most trade regulation rulemaking proceedings are likely to remain highly complex, and the records will probably continue to be large. Specifically, the Commissioners should have procedures which assure that they systematically consider and respond to all significant comments submitted by interested persons during a rulemaking proceeding. It should

be recognized that the Commissioners will necessarily have to consult with the rule-making staff, as well as other staff (e.g., economists in the Bureau of Economics), in analyzing and evaluating the record of a proceeding.

B. General Recommendations With Respect to the Procedures Required by the Magnuson-Moss Act

The Administrative Conference's study of the implementation of the Magnuson-Moss Act by the Federal Trade Commission provides compelling evidence that a statutory requirement for the mandatory use of the procedures contained in that act is not an effective means of controlling an agency's discretion in its exercise of a broad delegation of legislative power which has not acquired, in law, specific meaning. The Magnuson-Moss Act procedures can only be effective when the substantive decision-making process is structured, as in adjudication, by fairly detailed legal or technical standards which establish the boundaries on the inquiry and inform the participants what kinds of information are relevant and probative. This type of structure was lacking in trade regulation rulemaking by the FTC, and consequently, the combination of additional procedural requirements with informal notice-and comment procedures caused delay and uncertainty in the rulemaking proceedings, and appears to have contributed to judicial reversal of final rulemaking actions. Although the Conference concludes that procedures in addition to section 553 procedures should not, as a general matter, be statutorily required, agencies may decide to use such procedures—or other procedures—in the light of the circumstances of particular proceedings. Such action by agencies would be consistent with past Conference recommendations. See ACUS Recommendations 72-5 and 76-3.

The Conference's study of Magnuson-Moss rulemaking also shows that imposition of novel procedural requirements, such as those in the Magnuson-Moss Act, is likely to have high transition costs if applied to pending proceedings. Even if applied only to new proceedings, however, sufficient lead time is required for the agency to develop the procedures and internal structure needed to implement the new procedures. Thus, for example, reasonable time must be provided for an agency to adopt specific rules of practice and procedure to govern the conduct of the proceedings; to develop the staff and structure needed to index, organize, and make available a useful rulemaking record; to make available and train presiding officers to conduct the proceedings, and to inform and instruct its staff with respect to the new procedural requirements.

C. Evaluation of the Magnuson-Moss Act's Expense-Reimbursement Program

In Recommendation 79-5, the Conference concluded that the expense-reimbursement program was being implemented faithfully and efficiently in accordance with the statute, and adopted a number of recommendations concerning the administration of the program. The Conference reserved action on larger questions relating to the value of the program.

Although the overall value of reimbursement participation is impossible to quantify, reimbursed participants in the Commission's proceedings have provided a variety of viewpoints and information on relevant issues that would not otherwise have been presented. Through briefs and oral argument, they helped to focus the Commission's attention on matters which had not been highlighted by other participants. In addition, they developed empirical data which was useful to the Commission; effectively cross-examined witnesses presented by other parties and by staff, and presented expert testimony. These contributions to the Commission's proceedings attest to the value of the program.

The proceedings under the Magnuson-Moss Act have frequently raised complex technical and legal issues which required expert legal representation and a capacity to deal with sophisticated scientific and analytic concepts. In this circumstance, the fact that a relatively small number of participants received substantial compensation in several proceedings does not demonstrate a defect in the design or implementation of the program.

Although reimbursed participants often agree with staff to the extent of believing that a rule should issue, many significant differences between the positions of the reimbursed participants and the Commission staff emerged. General agreement as to the need for a rule did not prevent participants from presenting vigorously critical analyses of staff positions in proceedings or from presenting independent data and viewpoints which enriched the record. Moreover, staff positions were altered during the course of several proceedings, so that agreement between staff and reimbursed participants at the outset disappeared during the proceeding.

A. RECOMMENDATIONS WITH RESPECT TO THE ADMINISTRATION OF THE MAGNUSON-MOSS ACT BY THE FEDERAL TRADE COMMISSION

In trade regulation rulemaking under the Magnuson-Moss Act:

1. It is essential that the Federal Trade Commission structure the rulemaking proceedings to narrow and

focus the issues early in the proceeding and prior to the holding of the hearing required by section 18(c) of the Federal Trade Commission Act. It is highly desirable that the Commissioners themselves participate in and approve the narrowing and focusing of the issues to be explored at that hearing.

2. In taking final action, the Commissioners of the Federal Trade Commission should systematically consider and determine the agency response to all significant information and argument presented by interested persons during the rulemaking. Such presentations and the agency's response to them should be summarized in the statement of basis and purpose accompanying a final rule. The Commissioners should have the assistance of the Bureau of Consumer Protection's rulemaking staff, as well as other Commission staff, during their analysis and evaluation of the record in the proceeding.

B. GENERAL RECOMMENDATIONS WITH RESPECT TO THE PROCEDURES REQUIRED BY THE MAGNUSON-MOSS ACT

1. The procedures in the Magnuson-Moss Act have not proved to be effective in controlling the agency's discretion in its exercise of a broad delegation of legislative power, and it is recommended that Congress not rely on such procedures for such a purpose.

2. Moreover, because of the inherent difficulty of managing a proceeding and developing a coherent record where portions of the proceedings are to be conducted pursuant to the Section 553 model, and other portions according to additional procedures mandated by statute, often without a clear line of demarcation between the two portions, there is a high likelihood of delay and uncertainty and an increased risk of judicial reversal on procedural grounds. For this reason, Congress should not ordinarily require, for agency rulemaking, procedures in addition to those specified by section 553 of the Administrative Procedure Act, although the agencies should have the discretion to utilize them.

3. Statutes which impose novel procedural requirements, like those con-

tained in the Magnuson-Moss Act, on particular agency functions involve high transition costs if they are applied to pending agency proceedings. Consequently, the statutes should, by means of delayed effective dates or otherwise, provide significant lead time to enable the agency to develop the necessary procedural and administration practices and structures before commencing proceedings under the new procedural requirements.

C. RECOMMENDATIONS WITH RESPECT TO THE MAGNUSON-MOSS ACTS EXPENSE-REIMBURSEMENT PROGRAM

1. If the Magnuson-Moss Act's procedures remain in effect, the participant reimbursement program under the Magnuson-Moss Act should be continued without substantial modification.

2. If a group appears to have the capacity to make a significant contribution to a proceeding and it meets the statutory criteria, it should be eligible for reimbursement. No limit should be placed on the number of proceedings for which a group can be reimbursed, and no arbitrary ceiling on the amount of reimbursement to any group in a particular proceeding or year should be imposed.

3. Mandatory cost-sharing requirements should not be imposed, since they might prevent presentation of valuable viewpoints and evidence. Fee schedules and overhead allocation formulas should be periodically reviewed to assure that participants are adequately reimbursed for expenses incurred.

4. Public participant reimbursement programs should not preclude reimbursement of participants who support or favor the position of the agency staff. In deciding how reimbursement funds should be disbursed among agencies and proceedings, decision-makers should take into account the fact that reimbursement programs are likely to be most valuable in agencies or proceedings where there is a substantial difference between the positions of the agency staff and groups seeking reimbursement. They should also consider the amount likely to be spent by other participants who are not relying on the reimbursement program.

EDITORIAL NOTE: A separate statement was filed concerning this recommendation.

[45 FR 46772, July 11, 1980]

§ 305.80-2 Enforcement of Petroleum Price Regulations (Recommendation No. 80-2).

[45 FR 46774, July 11, 1980]

§ 305.80-3 Interpretation and Implementation of the Federal Advisory Committee Act (Recommendation No. 80-3).

The Federal Advisory Committee Act was enacted in 1972 in response to a wide range of criticisms concerning the activities and influence of advisory committees operating within and alongside government agencies. The need for the large number of committees in existence was questioned, and there were complaints over lack of adequate public information concerning their purposes, their membership, the course of their deliberations, and the extent of their influence. In addition, fears were expressed that committees were often inadequately balanced to reflect the spectrum of interests affected by their recommendations. Finally, the Government seemed frequently to fail to implement, or even to respond to, important recommendations offered by prestigious committees after protracted and expensive research, hearings and study.

It cannot be expected that FACA in operation would have wholly silenced the criticisms which led to its enactment. Yet, the Conference's study does indicate certain positive results from FACA, including more careful evaluation by Government of the need for establishing or continuing advisory committees, more attention paid to their makeup and responsibilities, and more openness in their deliberations. We are not prepared to recommend at this time any major revision of the statute, either to embrace more activities by committees and similar groups, or to reduce the coverage and requirements of the Act. However, there are areas where clarification and perhaps some narrowing of coverage would ease problems of administration and remove artificial barriers to communication between the agencies and the interested public. In addition, a more vigorously coordinated implementation of FACA by the Executive Branch would provide more guidance to the agencies and the public and a more consistent application of FACA within Government and in the courts.

RECOMMENDATION

1. The Federal Advisory Committee Act directs the Office of Management

and Budget to "prescribe administrative guidelines and management controls applicable to advisory committees." This authority has since been transferred to the General Services Administration by Reorganization Plan No. 1 of 1977, and Executive Order 12024. Neither OMB nor GSA has made adequate use of this statutory authority to assist the agencies in resolving difficult questions involving the coverage of the Act, particularly the applicability of the Act to *ad hoc* and informally established advisory groups. As a result, courts have been faced with the need to resolve such issues without the assistance of authoritative administrative guidelines. Accordingly, GSA, in consultation with OMB and the Department of Justice, should undertake a revision of the guidelines at present contained in OMB Circular A-63, so as to provide greater assistance to the agencies, and, in particular, to deal with the problems of classification of committees experienced under the Act (see paragraph 2, below). The proposed guidelines should be made available to agencies and the general public for comment before they are finally issued, and upon issuance the guidelines should be widely published. Where a legal dispute concerning the applicability of the Act to particular advisory bodies cannot be resolved between the agency and GSA, the dispute may be submitted to the Department of Justice for resolution pursuant to Part 1-4 of Executive Order 12146.

2. The most serious problems regarding the coverage of FACA have involved the applicability of the Act (a) to groups convened by agencies, on an *ad hoc* basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency, and (b) to privately established groups whose advice is "utilized" by an agency.

(a) Uncertainty as to the applicability of FACA to one-time or occasional meetings between *ad hoc* groups and Government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding char-

tering, advance notice, and structure of the committee. The Administrative Conference believes that the Act is not applicable to *ad hoc*, unstructured, non-continuing groups and that GSA's guidelines should make this clear. Coverage of such groups would not further the purposes of the Act.

(b) The Conference believes that the definition of "advisory committee" is limited to committees either established by Government action or affirmatively supported and "utilized" by the Government through institutional arrangements which amount to the adoption of the group as a preferred source of advice. GSA's guidelines should make this clear.

(c) Agencies should be sensitive to the desirability of making available to the public advice or information obtained from private or *ad hoc* groups not covered by FACA when the agency is considering action based on such advice or information.

3. Advisory committees frequently are useful in furnishing expert technical and scholarly advice to the Government, often at little or modest cost, and in providing a valuable channel of communication between the Government and the private sector. FACA has been successful in bringing about the elimination of many unnecessary advisory committees. It continues to serve a constructive purpose in requiring agencies and GSA periodically to evaluate the usefulness of each advisory committee, but such a review should be objective and should not be premised on any assumption that fewer advisory committees is a desirable goal in and of itself.

EDITORIAL NOTE: A separate statement was filed concerning this recommendation.

[45 FR 46775, July 11, 1980]

§ 305.80-4 Decisional Officials' Participation in Rulemaking Proceedings (Recommendation No. 80-4).

Several recent lawsuits have challenged the propriety of an official's participation in rulemaking proceedings. In those cases, efforts were made to force the "disqualification" of persons whose judgment might shape an agency's regulations, much as disqualification might have been sought in an adjudicatory proceeding allegedly tainted by the adjudicator's bias.

The concepts of bias (real or supposed) pertinent to the fairness of a judicial trial or an administrative adjudicatory hearing have limited applicability to rulemaking proceedings. The political, legislative, and institutional aspects of the rulemaking function and the frequency with which persons selected for policy-making responsibilities are selected precisely because they have previously declared their beliefs make direct application of a judicial test for disqualification inappropriate. Moreover, the determinants of a "fair hearing" that are implicit in the due process clause are inapplicable in proceedings of an essentially legislative nature, whose procedures are controlled by statutory rather than constitutional provisions.

Nevertheless, the acceptability of regulations and, indeed, the repute of the administrative process may be seriously impaired if the judgment of agency officials who can determine the content of rules is considered to have been tainted by a conflict of interest, by an inflexible prejudgment of pertinent factual propositions, or by indecorous manifestations of hostility. Each administrative agency that possesses power to promulgate regulations should adopt procedures and standards that define whether an official should abstain (or, if need be, be barred by the agency) from participating in a particular rulemaking proceeding.

The recommendation that follows proposes minimum standards of propriety. More exacting standards may be formulated by an agency for the conduct of its affairs or may be self-imposed by an official who on his own motion chooses not to participate in a particular proceeding. The basic proposition underlying the recommendation is that unimpaired capacity to exercise a fully informed judgment, as well as freedom from personal, private interest in the outcome of particular matters, is implicitly demanded of those to whom Congress has granted power to formulate rules for the future.

The standards sketched here are consonant with those embodied in statutes that govern government employees' behavior, in statutory procedures that have generally been provided for rulemakings, and in the six precepts of ethical employee behavior formulated by the Office of Personnel Management.¹

The following recommendation is directed toward agencies that conduct rulemaking proceedings under the informal procedures of the Administrative Procedure Act, 5 U.S.C. 553, or particular statutes defining rulemaking procedures other than formal, on-the-record rulemaking. The recommendation relates solely to agency personnel with decisional responsibilities in the rulemaking process. Definition will perforce vary from agency to agency because of differences in internal organization and allocation of responsibility. No suggestion is made here that every public employee who, at one stage or another, may contribute in one manner or another to rulemaking proceedings is to be subjected to interminable tests of probity and objectivity before the ultimately responsible "decisional personnel" can act.

RECOMMENDATION

A. Procedures. 1. Each rulemaking agency should promulgate procedures by means of which persons who desire to participate in a rulemaking proceeding (or who may be affected by its outcome) can challenge the suitability of participation by particular decisional personnel in that proceeding. The procedures should identify the factors that bear on suitability and should indicate the appropriate time, place, and means of making challenges, along with an indication of opportunity for intra-agency review if one be available.

2. The procedures should also make plain that a decisional official, whether or not challenged, may voluntarily abstain from participating in a particular proceeding.

B. Conflict of Interests. 1. A decisional official whose financial interests or those of whose immediate family may be distinctively favored by choices to be made in a particular rulemaking proceeding should voluntarily abstain (or be required by the agency to abstain) from participation in that proceeding, subject to publicly stated

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government."

¹ 5 CFR 735.201a:

"An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

(a) Using public office for private gain;
(b) Giving preferential treatment to any person;

and applied agency exception for *de minimis* holdings.

2. New agency officials should be subjected to "cooling off" periods of variable duration, during which their participation in a rulemaking proceeding would presumably be inappropriate if

(i) The proceeding specifically affects the financial interests of an immediately prior employer or client; or

(ii) The official's immediately prior employer or client is a participant in the proceeding; or

(iii) The official has participated in the proceeding before becoming a public employee.

An agency's application of a "cooling off" requirement should not, however, reflect absolutes. It should take into account the following factors, singly or in combination:

(a) The extent of the official's participation in a prior private capacity in the pending rulemaking proceeding;

(b) The elapse of time between the prior involvement and the official's present activity as a public employee;

(c) The nature and magnitude of the rulemaking's possible impact on the interests of the prior employer;

(d) The generality or specificity of the rulemaking's scope;

(e) The extent of the prior employer's participation;

(f) Applicable professional standards;

(g) Senatorial consideration, during the confirmation process, of the official's prior relationships and activities.

3. An official's non-financial interests, associations, or activities (whether or not related to past employment) may in some instances suggest the desirability of recusal or, if need be, a direction to the official to abstain from participating in a particular proceeding. If the official's appointment has been confirmed by the Senate with knowledge of the appointee's past interests and activities, a required cooling off period would ordinarily be inappropriate. As to officials of lesser prominence, however, agencies may suitably utilize in respect of nonfinancial interests the procedures sketched above, related to financial conflict of interests or to cooling off periods. The question of precluding participation

should arise only when an identifiable interest is significant in relation to the proceeding and is likely to be substantially affected by its outcome. Mere membership in an association would not ordinarily be a ground for disqualification or recusal.

4. Finally, agency conflict of interests rules should make emphatically plain that they are in aid of the agency's self-management; that they are measures in furtherance of its own quality control rather than in amplification of judicial control; and that they are agency declarations for guidance of its own staff concerning decorum. An agency that is insensitive or lax in fulfilling its declared expectations will no doubt be of concern to the Congress or to the Executive, but an agency's heightened attentiveness to the qualities of decisional personnel should plainly not expand the occasions for or the scope of review of rulemaking proceedings.

C. *Prejudgment of Fact.* 1. Disqualification for prejudgment in rulemaking should be limited to prejudgments of particular "adjudicative" or "specific" facts, where it may be inferred from the particular statutory framework, agency procedural choices, or other special circumstances that the agency's determination of those facts is to be based on the evidentiary record developed in the proceeding. Cause for disqualification can appropriately be decided by the agency only after it is established in the proceeding that such facts will be materially at issue in the proceeding. Such disqualification is inappropriate for factual judgments that are the consequence of earlier stages of the proceeding, or for prejudgments of policy.

2. To avoid undue interference with the legislative, policymaking aspect of the rulemaking process and other agency functions, disqualification for prejudgment of fact should be considered by the agency only after it has determined that critical "adjudicative" or "specific" facts require resolution on the evidentiary record developed in the proceeding, and should require at least a preponderant showing that an agency member or decisional employee has a closed mind regarding those facts.

D. Decorum and Expression of Views. A rulemaking proceeding should be conducted with decorum and respect for the interests of all concerned. Agency officials should therefore conscientiously avoid intemperate expression or other behavior suggestive of an irrevocable commitment to a predetermined outcome of the proceeding. This does not mean, however, that agency officials may not express factual judgments based on previous experience or on information received during a proceeding; nor does it suggest that officials may not act upon or voice opinions concerning underlying issues of policy. Expressing those opinions in interchanges with committees of the Congress, other administrative bodies, the public, and regulated groups is a desirable normality of administration, rather than an abnormality to be shunned, and is not a basis on which exclusion from a proceeding may appropriately be suggested.

[45 FR 46776, July 11, 1980]

§ 305.80-5 Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action (Recommendation No. 80-5).

(a) Many agency actions subject to direct review in the courts of appeals involve more than one private party that may legitimately consider itself aggrieved by the agency action. In most such cases, a single court of appeals is not specified by statute as the reviewing court, and venue may lie in more than one such court. Many lawyers believe that one court of appeals is likely to be more receptive than another to their clients' arguments in an agency review proceeding. The choice of the reviewing court has therefore assumed large importance in the review of some actions of some agencies.

(b) A statute, 28 U.S.C. 2112(a), provides that, when petitions for appellate review of the same order are filed in two or more courts of appeals, the record of the agency proceeding is to be filed by the agency in the court in which the first petition was filed, and that court then has jurisdiction of the review proceeding to the exclusion of others. This provision has become less and less useful as the choice of forum has become more significant in lawyers' minds and races to the courthouse have proliferated and methods of conducting the races have become more refined. Races are now sometimes decided by seconds or fractions of seconds, if they can fairly be said to have

been decided at all. (There is no single finish line to cross or tape to break; time stamping machines in clerks' offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations designed to make the races fairer and more civilized, specifying the date and time at which agency orders are deemed to have been issued.

(c) The spectacle of the race to the courthouse is an unedifying one that tends to discredit the administrative and judicial processes and subject them to warranted ridicule. It will require Congressional action to bring the final curtain down on the spectacle. Our first and principal recommendation is addressed to Congress. It calls for simple random selection of the reviewing court when a race ends in a dead heat or near dead heat. Pending Congressional action, there are actions that the agencies and the courts themselves can take to ameliorate the present sorry situation, and we also make recommendations addressed to the agencies and to the Judiciary for such interim actions.

PART A. RECOMMENDATION TO CONGRESS

1. Congress should amend 28 U.S.C. § 2112(a) to provide that, if petitions to review the same agency order have been filed in two or more courts of appeals within ten days after the order was issued, the agency is to notify an appropriate official body, such as the Administrative Office of the United States Courts, of that fact; that the appropriate official body, on the eleventh day after the issuance of the order, is to choose from among the circuits in which petitions have been filed according to a scheme of random selection and notify the agency of that choice; and that the agency is then to file the record of the proceeding in the court so chosen, which will take jurisdiction and conduct the review proceeding, subject to the existing power, which would not be changed, to transfer the case to any other court of appeals for the convenience of the parties in the interest of justice.

2. The amended section 2112(a) should provide further that a court of appeals in which a petition for review has been filed that has jurisdiction to entertain the petition may, in a case of pressing need, issue a stay of the agency order during the period in which no court has been chosen to take jurisdiction of the proceeding,

the stay to remain in effect for no more than 15 days, unless extended by the chosen court or a transferee court, and subject to revocation or modification by the chosen court or a transferee court; and that, if the court in which the record is filed determines that it lacks jurisdiction or venue is improperly laid but that jurisdiction and venue may be proper in another circuit, the court is to notify the official body administering the system of random selection of that fact, and that body then will choose from among the remaining courts in which petitions have been filed according to the same scheme of random selection.

PART B. RECOMMENDATION TO THE AGENCIES

In the absence of legislation, those agencies whose actions have resulted or are likely to result in races to the courthouse should specify in advance a time at which their orders are to be deemed issued or their actions are otherwise ripe for judicial review. Such agencies should do this by generic regulation if possible and, if that is not possible, by specifying times of issuance or ripeness case by case.

PART C. RECOMMENDATION TO THE JUDICIARY

In the absence of further legislation the Supreme Court should promulgate a rule under which, if petitions to review the same agency order are filed in two or more courts of appeals simultaneously (for example, within one minute of one another), the Administrative Office of the United States Courts is to be informed of that fact, and the Administrative Office is then to choose one court, according to a scheme of random selection, from among the circuits in which such simultaneous petitions are pending, which court shall then determine where the record is to be filed pursuant to 28 U.S.C. 2112(a).

[45 FR 84954, Dec. 24, 1980]

§ 305.80-6 Intragovernmental Communications in Informal Rulemaking Proceedings (Recommendation No. 80-6).

(a) The growing complexity and scope of government regulation resulting from infor-

mal rulemaking proceedings have increased the importance of communication and coordination among agencies. Because the President, as the nation's Chief Executive, may be deemed accountable for what agencies do, efforts to achieve policy coordination through Presidential channels have become increasingly significant. In recent years the President has attempted to do this through a variety of analytical and procedural mechanisms, such as the promulgation of Executive Order 12044 and establishment of the Regulatory Analysis Review Group and the Regulatory Council. The exercise of Presidential direction has not been limited to the establishment of general mechanisms, however. The President, his advisers, and units of the Executive Office have also on occasion intervened directly in the formation of policy during particular rulemaking proceedings. This intervention has raised questions by private participants about the manner in which executive influence should be exercised.

(b) This recommendation addresses the appropriate standards for communication to Executive departments and agencies from the President, advisers to the President, units of the Executive Office, and other Executive branch and independent agencies when the recipient agency is making policy decisions through the process of informal rulemaking. It pertains to rulemaking of general applicability, not to proceedings (whether rulemaking or adjudication) that involve the distribution, modification or withdrawal of valuable privileges to identifiable private interests. To some degree it is a corollary to ACUS Recommendation 77-3 which is concerned with restrictions upon private participants' oral and written communications in informal rulemaking. The recommendation is based upon the need to accommodate two competing elements of a good rulemaking process. The first is the desirability of being able to identify a coherent body of factual information upon which the rulemaking agency's decision is based, and to make this information available to all—other participants in the process, the staff of the agency itself, and reviewing courts. The second is the desirability of affording government officials opportunity to engage in uninhibited internal debate over the policy implications of this body of information, subject only to the requirement that the ultimate conclusion be rational and adequately explained. Both principles are recognized in this recommendation. Units of the government other than the one conducting the rulemaking may have perspectives or expertise not readily available to the rulemaking agency that would enhance the quality of internal debate on the implications of the information in the public file, and their participation should be encour-

aged. At the same time, rulemaking agencies should not permit, and other units of the government should not request, any opportunity to introduce into the proceeding material factual information (as distinct from indications of governmental policy) not made available to other participants.

(c) The Conference is also concerned with avoiding any possibility that intragovernmental communications from outside the rulemaking agency might serve as undisclosed or inadvertent conduits for new material factual information, and with providing adequate opportunities for other participants to respond to material factual information that is introduced.

(d) The recommendation addresses the degree to which agencies should be free to receive certain kinds of intragovernmental communications in informal rulemaking without having a duty to place them in the public file of the proceeding. It is not intended to suggest any limitation on the discretion of any rulemaking agency to disclose such communications to the public.

RECOMMENDATION

1. Any Executive department or agency engaged in informal rulemaking in accordance with the procedural requirements of section 553 of the Administrative Procedure Act should be free to receive written or oral policy advice and recommendations at any time from the President, advisers to the President, the Executive Office of the President, and other administrative bodies, without having a duty to place these intragovernmental communications in the public file of the rulemaking proceeding except to the extent called for in paragraph 2.

2. When the rulemaking agency receives communications from the President, advisers to the President, the Executive Office of the President, or other administrative bodies which contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule, the agency should promptly place copies of the documents, or summaries of any oral communications, in the public file of the rulemaking proceeding. All communications from these sources containing or reflecting comments by persons outside the government should be so identified and placed in the public file, regardless of their content. A rulemaking agency should consider the importance of giving public participants ade-

quate opportunity to respond if the material presents new and important issues or creates serious conflicts of data.

3. The Administrative Conference takes no position in the present recommendation concerning rulemaking by other than Executive departments and agencies.

EDITORIAL NOTE: Several members joined in a separate statement concerning this recommendation. The text appears in the *FEDERAL REGISTER*.

[45 FR 86407, Dec. 31, 1980]

§ 305.81-1 Procedures for Assessing and Collecting Freedom of Information Act fees (Recommendation No. 81-1).

A decade has passed since the Administrative Conference of the United States last evaluated implementation of the Freedom of Information Act, 5 U.S.C. 552.¹ The goals of the Act have been widely accepted within the government and society, but the passage of time has revealed some discrete problems regarding the operation of the Act.

This Recommendation was prompted by reports that implementation of the Freedom of Information Act is much more costly than originally expected and, more importantly, that many information requests are made in the context of private activity unrelated to the Act's goal of informing the public about the operation of government or matters of public interest. Therefore, the Recommendation calls for amending the Freedom of Information Act to permit agencies to charge persons requesting records fees which reflect the cost of reviewing records and deleting exempt information from records, in addition to the direct costs of search and duplication now recoverable under the Act. This Recommendation would not affect the rights of individuals under the Privacy Act, 5 U.S.C. 552a.

This Recommendation also contains advice on appropriate procedures for assessing and collecting fees, and recommends that the Department of Justice be required to establish guidelines for agencies to follow when adopting fee schedules and rules for assessing and collecting fees. The Conference believes uniformity in agency practice should be encouraged whenever practical.

¹ See ACUS Recommendation 71-2, Principles and Guidelines for Implementation of the Freedom of Information Act (adopted May 7, 1971).

RECOMMENDATION

1. Congress should amend the Freedom of Information Act to:

(a) Permit agencies to collect from persons requesting records fees that reflect the costs of routine review of records to determine whether an exemption should be asserted, and of deleting exempt information, in addition to the search and duplication costs now recoverable under the Act. However, fees charged for such requests should not include (1) the cost of agency review conducted on appeal of initial agency denials of Freedom of Information Act requests, or (2) the cost of review associated with development of general policy on releasing the type of information or records covered by the request;

(b) Permit units within agencies to establish separate fee schedules where those units maintain separate FOIA operations and their costs are readily separable from other units of the agency;

(c) Require that the Department of Justice, after allowing the agencies and the public the opportunity to comment, promulgate government-wide guidelines for agency fee schedules and for the assessment, collection and waiver of fees under the Freedom of Information Act. The guidelines should be consistent with the other sections of this recommendation, and should promote uniformity in agency regulations whenever practical.

2. Congress should retain the provision in section 552(a)(4)(A) of the Freedom of Information Act, which provides that persons requesting records shall have fees waived or reduced where the agency determines that furnishing the information will primarily benefit the general public.

3. Congress should not amend the Freedom of Information Act to permit agencies to recover in fees the overhead costs occasioned by the Act.

4. Congress should consider collecting accurate and uniform data on the cost of the Freedom of Information Act, since existing data is unreliable.

5. Department of Justice guidelines or, in their absence, agency rules should provide that:

(a) Agencies waive Freedom of Information Act fees whenever the costs of

routine collection and processing of the fee are likely to equal or exceed the amount of the fee. The level of this waiver provision should be established by agency rule, and should be expressed in terms such as hours of staff time and pages furnished, rather than a fixed dollar amount;

(b) Persons will ordinarily not be charged for the cost of search if no records are produced by the agency. However, with respect to a request not entitled to a fee waiver, an agency should be permitted to assess search fees if the requester insists on further search after being informed by the agency, based on a reasonable preliminary search, that the search is unlikely to be productive;

(c) Agencies may by rule provide that the submission of a Freedom of Information Act request constitutes an agreement by the requester to pay an amount of fees specified in the rule, unless the requester is entitled to a fee waiver or specifies a different amount in the request;

(d) Agencies should be required to notify requesters if fees are expected to exceed an amount fixed by rule or otherwise agreed to by the requester. If a requester does not agree to pay additional fees, the agency may suspend the search and processing of records;

(e) Agencies may require advance payment of fees if a requester has failed to honor a previous commitment to pay fees that were owed an agency, or if the agency reasonably determines that the requester is likely to be unwilling or unable to pay the probable fees;

(f) Agencies will provide an administrative appeal mechanism through which requesters may challenge fee and fee waiver decisions. Agency decisions on fee appeals should be maintained in a separate public file for use by requesters and agency employees.

[46 FR 62805, Dec. 29, 1981]

§ 305.81-2 Current Versions of the Bumpers Amendment (Recommendation No. 81-2).

EDITORIAL NOTE: The preamble is omitted pursuant to § 304.2(a) of this chapter. It may be found in the FEDERAL REGISTER and

in the 1984 edition of the Code of Federal Regulations.

RECOMMENDATIONS

1. Congress should not enact the so-called Bumpers Amendment in any of its current versions, or any similar across-the-board legislation altering the weight reviewing courts afford agency statutory interpretations or expertise.

2. If Congress nevertheless believes it necessary to enact legislation directed to the weight to be accorded administrative interpretations, it should substitute for the currently pending provisions the following clearer, more effective formulation:

(a) Amend section 706(a) of the Administrative Procedure Act by adding the word "independently"; and

(b) Either eliminate proposed section 706(c) altogether or adopt the following version of the section, similar but not identical to the current House Judiciary and Senate Governmental Affairs versions:

(c) In making determinations concerning statutory jurisdiction or authority under clause (2)(c) of subsection (a) of this section the court shall determine whether action by the agency is within the scope of the agency jurisdiction or authority on the basis of the terms of the statute and other evidence of legislative intent.

3. Congress should amend section 706 of the Administrative Procedure Act by adding a new subsection, to read as follows:

In determining whether an agency action in adopting a rule in a proceeding subject to section 553 of this title is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the court shall consider whether there is substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis of the rule.

[46 FR 62806, Dec. 29, 1981]

§ 305.82-1 Exemption (b)(4) of the Freedom Of Information Act (Recommendation No. 82-1).

The Freedom of Information Act (FOIA) allows public access to the records of Federal agencies, whether such records are gener-

ated by the agencies or obtained by the agencies from other sources, including private individuals. Large numbers of FOIA requests are made by or on behalf of commercial interests seeking to utilize the government's processes to acquire information that has been prepared at the expense of private firms and individuals and submitted to the government as part of a study or pursuant to a regulatory requirement or other government information-gathering program. Often the privately submitted government records subject to FOIA disclosure contain information which will lose value to the submitter if it is disclosed. This availability of FOIA as a tool for low-cost commercial information-gathering—or, in some instances, industrial espionage—needs to be limited.

Exemption (b)(4) of FOIA permits agencies, as a matter of discretion, to withhold trade secrets and commercial or financial information obtained from a person which is privileged or confidential. Although FOIA contains procedural safeguards and a right of judicial review for requesters of agency records, the Act is silent regarding the rights of submitters of information whose legitimate interests may be impaired as a result of public disclosure of their information. Submitters are insecure about the degree of protection their information will receive when it is in the government's possession, and agency collection of private information may be hindered due to reluctance on the part of submitters to trust that the government will not disclose valuable documents.

While the Administrative Conference strongly endorses the FOIA concept of exposure of the government's activities, the disclosure of information created by private persons involves different values. Private needs and public access desires are in conflict in this limited area of FOIA disclosures. Congress should amend exemption (b)(4), both to insure that the private rights of submitters of information are adequately protected and to provide for a more efficient decision-making process within the government for disposing of claims regarding the applicability of exemption (b)(4).

SCOPE OF THE EXEMPTION

Information deserving protected treatment under exemption (b)(4) has four characteristics. First, it is "private" information; the records in the government's possession were created by a "person" and submitted to the government, rather than generated internally within an agency.¹ The informa-

¹ In an instance where one government agency submits analogous information to

Continued

tion need not be "about" the submitter—an example is a submitter's analysis of market conditions in a market where the submitter does no business—but the information must be such that it is ordinarily considered to be the "property" of the submitter, i.e., except for the government's possession, the submitter has an exclusive right to dispose of the information.

Second, the information is, in the ordinary colloquial sense, "confidential". It is held by the government in confidence and is not already in the public domain as a result of lawful disclosure by the government or by others, nor is it required by law to be made public.

Third, the information will have value to the submitter that disclosure threatens to diminish. It should not be necessary for a submitter to prove that the value loss will be "substantial", or to demonstrate the precise manner in which persons receiving access to the information may use the information to cause injury to the submitter. Such requirements impose unreasonable burdens upon submitters, strain the capacity of the decision-making process, and do not produce predictable results. It should be enough that the submitter have a valuable interest in the information, and that disclosure may reasonably be expected to impair that interest. In this respect, due regard should be given both to the probability and to the magnitude of impairment; thus the greater the harm potentially resulting from disclosure, the less need a showing be made of the certainty of occurrence of the harm, and vice versa.

In addition to the traditional "commercial" and "financial" interests that may be jeopardized by the disclosure of confidential information, "business" information—a bit of commercially relevant information which alone appears insignificant but which, when combined with other bits, can reveal important business data—appropriately should come within exemption (b)(4). And "research" information, whether submitted by a commercial or non-commercial person, should be recognized to have value to the submitter and to be deserving of protection.

Fourth, the interests to be protected by (b)(4) must be "legitimate". The exemption should not be used to shield evidence of unlawful activities, fraud, waste, or government mismanagement. This condition is necessary to insure the availability of FOIA as an effective means of the public's over-

another agency, the information should be considered "private" for these purposes. A government entity that operates in a commercial, and perhaps highly competitive, marketplace will have interests of the same kind as if it were privately owned, and should receive similar protection.

sight of government, while protecting those private interests that legitimately are not in the public domain.

Agencies currently have discretion, subject to the limitations of the Trade Secrets Act (18 U.S.C. 1905), to release a submitter's exempt (b)(4) information, even though disclosure might cause damage to the submitter. The Conference, believes, however, that valuable private information in the government's files should not be subject to release under FOIA, except where disclosure is necessary to prevent injury to an overriding public interest. This limited power of discretionary release should be exercised with caution, and agencies should conduct public interest inquiries only when a strong initial showing has been made that an adequate basis for discretionary disclosure is likely to exist.

Finally, the Conference proposes to clarify further the scope of agencies' discretion to disclose confidential information by amendment of the Trade Secrets Act to eliminate any potential conflict between the two acts and to establish FOIA as the statute controlling agency release of confidential information to a requester.

THE DECISIONMAKING PROCESS

Selecting administrative and judicial processes that will provide both fair and efficient resolutions of particular controversies requires a careful examination of the institutional capabilities available for decision-making. A decision by the government whether to invoke exemption (b)(4) is not a typical agency program decision. In situations where a FOIA request involves contested (b)(4) information, agencies frequently act merely as stakeholders, and do not necessarily provide a proper forum for prompt and accurate decision-making. The matters to be decided often are outside the expertise of agency officials. For example, "impairment" of a protected interest could take the form of exposure of a secret manufacturing process, or it could be released of a consumer attitude survey that reveals the potential profitability of a new product, or it might involve disclosing the number of employees working on a particular assembly line where knowledge of the number could aid a competitor correctly to estimate manufacturing costs for the assembled product. Agency personnel most likely to be called upon to evaluate claims of exempt status will be program officials or FOIA officers, neither of which is likely to have a fundamental appreciation of the value of private information in the commercial marketplace.

The interests of requesters of information under FOIA, including possible (b)(4) information, have been and will continue to be best served by providing speedy informal agency action followed by a right of de novo

judicial review of adverse agency decisions. Prudence and justice require that, when submitters become involved in a FOIA request, the procedures and standards of decision-making be the same as for cases involving requesters only.

Considering these factors, the Administrative Conference favors informal agency processes sufficient to prevent inadvertent releases of exempt material to a requester, to join the issues adequately, and, when feasible, to provide a prompt resolution of disputes, coupled with rights for both submitters and requesters to obtain de novo review in the district courts of adverse agency decisions regarding the applicability of exemption (b)(4) to requested information.

The Conference stresses the importance of considering agency procedures in tandem with the scope of judicial review. In this recommendation, the Conference has taken care to match an informal agency process—i.e., one that does not result in the creation of a detailed agency record—with an opportunity for de novo judicial review unlimited in its scope to consider the matters at issue.

However, different factors apply to an agency determination to disclose, on the ground of preventing harm to an overriding public interest, information that is unquestionably exempt under (b)(4). In such an instance, the required balancing of interests—harm caused by non-disclosure against harm caused by disclosure—is more likely to result in the creation of a reviewable record. Here an agency may consider the public use to which the information will be put, as claimed by the requester, as well as all potential private uses of all users of the information, once it is disclosed. Balancing the public's needs against individual costs in this fashion involves matters appropriately committed to an agency's determination, and the Conference recommends that the scope of judicial review of an agency decision to disclose exempt (b)(4) information be limited to whether the agency action is "arbitrary or capricious".

The Conference rejected, after careful consideration, the possibility of creating a new judicial cause of action that would permit requesters to bring suit to compel an agency to release exempt (b)(4) information. At present requesters have no right to compel disclosure of information falling within any of the FOIA exemptions, and a rule to the contrary regarding exemption (b)(4) would likely be accompanied by great confusion regarding the status of confidential information (a problem sought to be eliminated by this recommendation), and could well result in a flood of new FOIA litigation.

At the agency level, fundamental fairness requires that submitters be given notice of an intended agency release of their information whenever there is a reasonable possibil-

ity that the information is covered by exemption (b)(4). Such a notice requirement should be included within FOIA. Agency information gathering and handling procedures vary greatly, however, and the details of providing notice are more appropriately determined by individual agencies through the rulemaking process. Further, there is such a wide variation in the types of information subject to the exemption, and in the criteria appropriate to establish a claim of exempt status, that each agency should give individual consideration to techniques that will best facilitate its own disposition of determinations under the exemption.

The additional procedural protections recommended here will require that the statutory time limits in FOIA be adjusted accordingly, at least for documents involving the (b)(4) exemption. While the Conference makes no recommendation with respect to specific intervals of time, the interests of prompt agency response and government credibility will require that more realistic limits be set by Congress.

Nothing in this recommendation is intended to diminish the ability of requesters, whose rights are established independently under FOIA, to obtain access to non-exempt agency records. Requesters would remain entitled to disclosure of privately submitted agency records absent a determination that (b)(4)—or some other exemption—applies. Where an agency does not assert a claim of exempt status for a submitter's information, the burden will be on the submitter to assert a right to exempt treatment, to demonstrate the applicability of the exemption, and to persuade the agency or judicial decision-maker that the information should not be disclosed.

RECOMMENDATION

A. SCOPE OF THE EXEMPTION

1. *Coverage.* Congress should amend exemption (b)(4) of FOIA to provide that the exemption applies to confidential information submitted to the government by a person and for which disclosure may reasonably be expected to impair the legitimate commercial, financial, business, or research interests of that person. (This recommendation is not intended to affect other laws that control the disclosure of specific agency records.)

2. *Discretion to Disclose.* The Act should be amended to eliminate agency discretion to disclose exempt (b)(4) information to a requester, except that agencies should be permitted to disclose otherwise exempt (b)(4)

information (i) when the submitter agrees to waive exempt status, or (ii) when the agency finds that to withhold the information would injure an overriding public interest. To eliminate confusion caused by the interrelation of FOIA and the Trade Secrets Act (18 U.S.C. 1905) Congress should amend the Trade Secrets Act to make clear that it does not authorize withholding under exemption (b)(3) of FOIA and does not inhibit discretionary disclosure of material under exemption (b)(4).

B. AGENCY PROCEDURES

1. *Notice.* Congress should amend FOIA to require that, prior to a final agency decision to disclose to a requester information that may fall within exemption (b)(4), the agency provide the submitter with notice adequate to permit the submitter to object to the disclosure. This amendment should also require that agencies specify by rule those instances in which a submitter is entitled to notice, the rules to include, at a minimum, instances in which, for the particular information requested, the submitter (i) has made a prior claim of exempt (b)(4) status, or (ii) had submitted the information under a promise of confidentiality, of (b)(4) treatment, or of notice of a FOIA request. In addition, agencies should consider whether, in some instances, it would be appropriate routinely to give notice to submitters of all requests for the submitters' data, so that the agencies will always have the benefit of the submitters' opinions on the applicability of (b)(4).

2. *Agency Information Handling Procedures.* Agencies should encourage the use of pre-marking by submitters to aid in the identification of materials that may be subject to exemption (b)(4). Congress should amend FOIA to authorize each agency to determine, by rule, whether pre-marking should be made a pre-condition for notice of pending disclosure; such rules should be based on a consideration of the nature of information subject to (b)(4) as well as the characteristics of those who submit it. Agencies should investigate whether certain routinely collected categories of information may appropriately be des-

ignated by rule as ordinarily subject to disclosure without notice, or ordinarily subject to withholding under exemption (b)(4); an agency using categories established by rules must bear in mind that such rules, which may greatly facilitate the handling of large volumes of requests in some cases, cannot override the FOIA itself and must provide that, prior to making a final decision on disclosure, the agency will, upon specific request, review particular documents to determine their exempt status. Agencies that handle large volumes of requests for information likely to contain (b)(4) exempt material should consider establishing, by rule, the nature of substantiation that would ordinarily be required to support a claim of exempt (b)(4) status.

3. *Determination of Exempt Status.* Congress should amend FOIA to provide for written objections by a submitter in instances of contested (b)(4) determinations. In making determinations on the applicability of exemption (b)(4), agencies should use informal techniques, and should avoid utilizing time-consuming adversarial methods. During the decision-making process, agencies must be sensitive to the special problems of both submitters and requesters. Agency procedures must not disclose to a requester the basis of a claim of exempt status when disclosure of the basis itself would compromise the confidentiality of the information. On the other hand, agencies should bear in mind that a requester does not ordinarily have access to such information as may be necessary to challenge a submitter's claim of exempt status. In order to facilitate informal agency resolution of potential conflicts between requesters and submitters, agencies should provide that, whenever possible, a requester receive and be permitted to comment upon a submitter's written objections to release, and to be present at oral hearings, if any, on the subject, as long as this does not compromise the confidentiality of the information.

4. *Discretionary Release of Exempt Information.* Once information has been determined to be exempt under (b)(4), a FOIA requester desiring to obtain disclosure of the information on the ground that non-disclosure

would injure an overriding public interest should bear a definite burden to demonstrate with specificity the basis for the request. A pro forma assertion of public injury due to non-disclosure should not be sufficient to trigger an agency inquiry. In considering whether to exercise its limited discretion to disclose otherwise exempt (b)(4) material, an agency appropriately may consider all potential uses to which the disclosed information may be put, and should balance any probable public harm in non-disclosure against probable harm to the submitter, the government, and others due to disclosure.

5. *Final Decision to Disclose.* Congress should amend FOIA to provide that a final agency decision to disclose information alleged by the submitter to be exempt under exemption (b)(4) be made by an agency official of a rank equivalent to that of the agency official authorized to deny a request for disclosure. Agencies should consider utilizing the same appeal process within the agency for submitter-contested cases as that used whenever a requester challenges a decision not to disclose.

6. *Agency Implementation.* Pending congressional enactment of the changes recommended herein, agencies should, to the extent permitted by law, immediately adopt all of the above proposals for improved agency procedures.

C. JUDICIAL REVIEW

1. *Cause of Action.* Congress should amend FOIA to provide that both submitters and requesters of a contested piece of (b)(4) information have a cause of action under FOIA, that each may intervene in suits brought by the other, and that opposing claims of submitter and requester can be resolved in a single forum.

2. *Scope of Review.* Congress should amend FOIA to provide that agency determinations regarding the applicability of exemption (b)(4) be subject to de novo consideration by the courts. Agency decisions to release exempt information to a requester, on the ground that non-disclosure would injure an overriding public interest, should be made reviewable at the instance of submitters of the informa-

tion under the "arbitrary or capricious" standard in 5 U.S.C. 706(2)(A).

[47 FR 30702, July 15, 1982]

§ 305.82-2 Resolving Disputes Under Federal Grant Programs (Recommendation No. 82-2).

Federal grants to governments, public service institutions and other non-profit organizations have been conspicuous instruments of Federal policy since the 1930s. During the past two decades the growth in the number of Federal grant programs, and the level of resources distributed through grants, has evidenced the expanded influence of the Federal government on the activities of these entities.

Ensuring proper conduct of Federal assistance programs has assumed increasing importance as these extraordinarily varied programs have proliferated. Federal domestic grant spending, which now exceeds \$100 billion annually, promotes major social goals. Grants, and the activities they assist, often are crucial to beneficiaries whom Congress intends to aid and to recipients who carry out program goals. For instance, over one-quarter of all expenditures by state and local governments now come from Federal grants, and thousands of smaller institutions depend on these funds for their very existence.

Each of these grants represents an understanding on the part of the Federal government and the grantee that is in the nature of a contractual commitment. The number and intensity of disputes over grants have risen in recent years, following both the increased reliance on Federal grants by other institutions and a growing Federal budget stringency that has decreased the generosity of Federal funding and increased the rigor of audit review. These disputes run the gamut from those that involve nearly pure questions of Federal policy and agency discretion to those that affect substantial grantee expectations or involve particularized adverse determinations about individuals.

Disputes may arise initially over the making or withholding of a grant, the amount of funds committed, or the terms and conditions imposed. Once the grantee has undertaken the project, controversies may occur over what actions the grantee has been funded or authorized to take, the grantee's relationships with program beneficiaries, subgrantees, or subcontractors, and other incidents of ongoing project administration, including grantee compliance with the terms and conditions of the grant. Disputes may arise in the form of audit disallowances. Finally, an agency may choose to terminate or debar a grantee or refuse to

provide continued funding based on the agency's belief about the adequacy of a grantee's performance of previous projects.

In prior recommendations, the Administrative Conference has called on all Federal grantmaking agencies to adopt informal procedures for hearing and resolving complaints by the public that a recipient's administration of a grant fails to meet Federal standards (Recommendations 71-9 and 74-2). While some agencies have carried out these recommendations, many still do not afford grantees or other persons affected by the operation of Federal domestic grant programs any channels for impartial consideration of their complaints. Congress has provided few directives in this area, except as to a few agencies like the Departments of Education and Labor, and actual agency practices in handling grant disputes have varied considerably.

This recommendation goes beyond the Conference's prior statements to focus on the rights that agencies should provide to grantees and applicants for grant funds. Few agencies afforded grant recipients any substantial appeal rights until the mid-1970's; some still fail to do so. In recent years, several agencies have begun to create processes to resolve some types of disputes with grantees and certain types of grant applicants. Their experience indicates that these appeal procedures, while sometimes flawed, have been useful for protecting grantees' rights and for helping agencies to avert needless and troublesome litigation, improve oversight of significant administrative problems, ensure that policies are applied fairly and consistently, and make decisions on a rational, justifiable basis.

Given the importance of these programs, the nature of the interests involved, public policy factors, and considerations of fairness enunciated in recent constitutional decisions, the Administrative Conference believes that all grantmaking agencies should maintain procedures to hear appeals regarding certain kinds of agency actions. For example, grantees generally have a special interest in debarment, termination, suspension, or certain kinds of renewal or entitlement situations. Also, disputes regarding some expenditure disallowances arising from audits, or other cost and cost rate determinations, may be crucial to a grantee, requiring payback of large sums. Because of the potential significance of these types of action, and their relative infrequency, agencies should establish appeals procedures for them. On the other hand, thousands of applications for competitive discretionary grants are denied each year, and the imposition of any broad appeal hearing requirement for this type of action could be quite burdensome to some agencies.

While the variety and complexity of federal domestic grant programs (and grant

disputes) ultimately renders uniform procedural prescriptions inappropriate, this recommendation sets forth some general considerations that agencies should find useful to guide them in assessing the adequacy of their present methods of resolving grant appeals. The Conference believes that an agency should have considerable latitude to tailor procedures to the characteristics of its programs and grantees, and in the great bulk of appeals agencies need not match the protections required in adjudications governed by the Administrative Procedure Act, 5 U.S.C. 554-557. The recommendation begins with, and centers on, the notion that informal action—including opportunities for conversations with relevant program officials and their superiors, mediation or ombudsman services, and similar devices—should form the core of the resolution process. Still, agencies should be aware that at least some disputes may arise, especially in post-award cases involving contested issues with substantial funds at stake, in which some kind of more formal agency review should be made available.

In making this recommendation, the Conference is aware that some agencies maintain appeal procedures which are more elaborate than those described below but provide equal or greater safeguards and protective measures. This recommendation is not intended to cast any doubt on the propriety of such procedures, or to assess the need therefor in light of specific programs or agency goals and concerns.

RECOMMENDATION

I. SCOPE AND INTENT OF THE RECOMMENDATIONS

The recommendations in Part II concern procedures for disputes involving domestic "grantees" and "vested applicants." A "grantee" may be a non-profit or community service organization, a unit of state or local government, a school, corporation or an individual who has executed a grant agreement or cooperative agreement with a Federal agency. A "vested applicant" is one who is entitled by statute to receive funds, provided the applicant meets certain minimal requirements; or one who applies for a noncompetitive continuation grant, and has been designated in some manner as the service deliverer for a designated area or is operating within a designated multi-year project period. Part III deals with agency-level processes for handling complaints by dis-

appointed applicants for discretionary grant funds. The procedures recommended herein are not intended to displace existing hearing mechanisms already required by law in some programs. They apply only to grant programs carried on primarily within the United States.

II. COMPLAINTS BY GRANTEEES AND VESTED APPLICANTS

A. Informal Review and Dispute Resolution Procedures

1. Each Federal grantmaking agency should provide informal procedures under which the agency may attempt to review and resolve complaints by grantees and vested applicants without resort to formal, adjudicatory procedures. The informal procedure could take several forms, including, for example, advance notice of adverse action and the reasons for the action, opportunity to meet with the Federal officials involved in the dispute, review by another or higher-level agency official, or use of an ombudsman or mediator. Attempts to resolve disputes under these informal procedures should be pursued expeditiously by the agency within a definite time frame. Notwithstanding these time limits, a complainant's invocation of more formal appeal procedures should not prevent further efforts to settle, mediate, or otherwise resolve the dispute informally.

2. The existence of informal review procedures should be made known to affected grantees and vested applicants in the manner described in paragraphs 3 and 12, below. Agencies should encourage their program and decisional officials to resolve grievances informally, and provide training to improve their abilities to do so. In undertaking such training, agencies should work with those agencies that already have begun to make use of mediation and other conciliatory approaches, such as the Departmental Grant Appeals Board in the Department of Health and Human Services, and existing groups with expertise in these methods of dispute resolution.

B. Notice of Agency Action

3. Upon issuance of an agency decision which (if not appealed) represents final agency action, each grantmaking agency should provide prompt notice of its action to the affected grantee or vested applicant. If the action is adverse to a grantee or vested applicant, the agency's notice, at a minimum, should provide a brief statement of the legal or factual basis for the action; state the nature of any sanctions to be imposed; and describe any available appeal procedures, including applicable deadlines and the name and address of the agency official to be contacted in the initial stages of an appeal.

C. Administrative Appeal Procedures

4. Each Federal grantmaking agency should provide the additional opportunity for some type of administrative appeal in at least certain kinds of grant-related disputes. This appeal may be conducted orally or in writing, depending on the nature of the dispute, and may be expedited where appropriate. In determining whether an administrative appeal should be afforded and the form of any such appeal for particular classes of disputes, agencies should consider the probable impact of the adverse action on the complainant, the importance of procedural safeguards to accurate decisionmaking in each class of dispute, the probable nature and complexity of the factual and legal issues, the financial and administrative burden that would be imposed upon the agency, the need for a perception of the government's fairness in dealing with grantees and vested applicants, and the usefulness of appeal procedures to give feedback on administrative problems.

5. In light of the factors described in paragraph 4, each Federal grantmaking agency should provide the opportunity for some kind of administrative appeal with regard to adverse actions involving:

a. The performance of an existing grant, including disputes involving debarment, termination, suspension, voiding of a grant agreement, cost dis-

allowances, denials of cost authorizations, and cost rate determinations;

b. The denial of funding to applicants for entitlement grants, including disputes involving the applicant's eligibility, amount of funding to be received, and application of award criteria or pre-established review procedures; and

c. The denial of applications for non-competitive continuation awards where the denial is for failure to comply with the terms of a previous award.

6. Where an opportunity for an administrative appeal is afforded, the agency should take into account the factors set forth in paragraph 4 and select from among the following forms of proceedings to provide the one most appropriate to the particular case:

a. Decision based on written submissions only;

b. Decision based on oral presentations;

c. Decision on written submissions plus an informal conference or oral presentation; or

d. Full evidentiary hearing.

Where a hearing or conference is useful to resolve certain issues, the agency may limit the hearing to those issues and treat remaining questions less formally. In addition, the agency should provide some form of discretionary expedited appeal process for disputes. In such proceedings, the agency may, for example, shorten time deadlines, curtail record requirements, or simplify procedures for oral or written presentations.

7. At a minimum, these administrative appeal procedures should afford grantees and vested applicants the following:

a. Written notice of the adverse decision (See paragraphs 3 and 12);

b. An impartial decisionmaker (for instance, a grant appeals board member, a high level agency official, a person from outside the agency, an administrative law judge, or certain other agency personnel from outside the program office) with authority to conduct the proceedings in a timely and orderly fashion;

c. Opportunity for the agency, complainant, and any other parties to the appeal promptly to obtain information

from each other, and to present and rebut significant evidence and arguments;

d. Development of a record sufficient to reflect accurately all significant factual submissions to the decisionmaker and provide a basis for a fair decision; and

e. Prompt issuance of a written decision stating briefly the underlying factual and legal basis.

8. Each Federal grantmaking agency should determine in advance, and specify by rule or order, the scope of the authority delegated to the decisionmaker in administrative appeals. For example, agencies should specify in advance whether the decisionmaker has the authority to review the validity of agency regulations or the consistency of agency actions with governing statutes.

9. Agencies should accord finality to the appeal decision, unless further review is conducted promptly pursuant to narrowly drawn exceptions and in accordance with preestablished procedures, criteria, and standards of review. If the decisionmaker is delegated, or asserts, authority to review the validity of agency regulations, the agency head should retain an option for prompt final review of the decision in accordance with applicable procedures.

10. Once these administrative appeal procedures are invoked, the decisionmaker should discourage all ex parte communications on the appeal unless the parties consent to such communications. Any ex parte communications that do occur should be disclosed promptly, and placed in the appeal record.

11. Agencies should encourage prompt decision of appeals by creating time limits or other guidelines for processing grant disputes, and should pay particular attention to resolving appeals over decisions regarding renewal and continuation grants in a timely manner. These timetables might be fixed generically or in accordance with the complexity of particular cases. Decisionmakers' compliance should be monitored by the agency pursuant to a regular caseload management system.

D. Public Notice

12. Grantmaking agencies should give advance notice and afford an opportunity for public comment in developing informal review and administrative appeal procedures. Agencies should ensure that available procedures are made known to grantees and vested applicants. Notice of such procedures should be published in the **FEDERAL REGISTER**, codified in the Code of Federal Regulations, and included in grant agreements and other appropriate documents, in addition to the individual notice described in paragraph 3.

13. Agencies should collect in a central location, and index, those written decisions made in administrative appeals. These decisions should be made available to the public except to the extent that their disclosure is prohibited by law. Whenever a grantee or vested applicant cites a previous written decision as a precedent for the agency to follow in its case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

III. COMPLAINTS BY DISCRETIONARY GRANT APPLICANTS

A. Informal Review Procedures

The Conference previously has called on agencies to develop criteria for judging discretionary grant applications and to adopt at least informal complaint mechanisms to ensure compliance with these criteria and other federal standards. (See Recommendations 71-9 and 74-2.) The Conference reiterates its belief that these procedures can benefit agency performance.

B. Public Notice

Each Federal grantmaking agency should ensure that available informal review procedures and administrative appeal procedures are made known to grant applicants. Notice of such procedures should be published in the **FEDERAL REGISTER**, codified in the Code of Federal Regulations, and included in application materials and other appropriate documents. (See also Recommendations 71-4 and 71-9.)

IV. IMPLEMENTATION OF RECOMMENDATION

Each Federal grantmaking agency should, within one year of the adoption of this recommendation, report in writing to the Administrative Conference the steps the agency intends to take, consistent with the above guidelines, to improve its dispute resolution process.

[47 FR 30704, July 15, 1982]

§ 305.82-3 Federal Venue Provisions Applicable to Suits Against the Government (Recommendation No. 82-3).

(a) This recommendation responds to proposals to amend statutes that govern venue in actions against the United States, its agencies and its officials. It calls for two limited changes: (1) Amendment of the district court transfer provision, 28 U.S.C. 1404(a), to provide explicitly that intervenors may request a change of venue, and (2) addition of a provision requiring that, when an action against the Government is brought in the District Court for the District of Columbia that may have a particular impact on residents of one or more states, notice be given to the Attorney General of any such state. Otherwise, it urges rejection of proposals to make the extent of local impact determinative of proper venue.

(b) The present venue statute governing most district court actions against the United States, its officers, or agencies is 28 U.S.C. 1391(e). Section 1391(e) permits suit in any district in which (1) a defendant resides, (2) the cause of action arose, (3) real property involved in the action is situated, or (4) the plaintiff resides, if no real property is involved. Under 28 U.S.C. 1404(a) a district court may transfer any civil action to any other district where it might have been brought "[f]or the convenience of parties and witnesses, in the interest of justice"

(c) The present venue requirements governing agency review proceedings in the courts of appeals are found in particular statutes, generally a section of the substantive statute under which the agency is acting. Most such statutes include the District of Columbia Circuit as one of the available forums; some statutes designate that circuit as the exclusive forum.²

² ACUS has previously addressed the advisability of direct review in the courts of appeals in Recommendation 75-3 ("the choice of forum for judicial review of administrative action"). Court-of-appeals

Continued

(d) Section 1391(e) applies to all sorts of actions, including actions for money damages. The concern of those making the current proposals is not with damage actions but with nonstatutory review proceedings, typically actions for declaratory judgments, injunctions, or mandamus. More particularly their concern is with only some of those cases, often environmental cases, that involve projects, people, or resources of particular states or regions.

(e) Those advocating modifications of the venue laws believe that too many of such "local" suits against the Government are heard in the courts of the District of Columbia and that the judges of those courts do not have the "feel" for local affairs that judges on the scene have. Proponents are mostly from the western states, and they emphasize how different are the arid, relatively undeveloped West and its problems from the East and its problems. They argue that the convenience of locally affected citizens and their perception that distant district judges are out of touch with local concerns should be important factors in determining venue. Therefore, they propose amending sections 1391 and 1404 to limit venue to the judicial district in which the residents would be most affected by the agency action or inaction that is the subject of the lawsuit. Similarly, they propose new statutory provisions governing court of appeals venue that would create new rights to obtain transfers to a circuit in which the impact of the suit is greater and would also eliminate all provisions for exclusive review in the District of Columbia Circuit.

(f) Across the board attempts to restrict the choice of forum presented by the current venue laws are unnecessary and unwise. The number of suits against the Government filed in the District of Columbia has not been disproportionate, and we believe that such suits have been transferred when appropriate. The current flexible venue statutes minimize threshold litigation, whereas the proposed modifications would involve costly preliminary determinations concerning the substantiality and location of impact. Many, probably most, of the cases with which the proposals are concerned are heard on agency records without the taking of testimony. Considerations of convenience to the parties (which in such cases really means counsel) and of the loca-

tion of the agency record often favor venue in the District of Columbia. Changes of venue may be obtained under 28 U.S.C. 1404, which provides that transfers to an alternate forum may be obtained "for the convenience of parties and witnesses, in the interest of justice." Where the convenience of locally-based parties or witnesses is a significant consideration, or the interests of justice otherwise indicate that the case should be tried in the local jurisdiction, courts have appropriately permitted transfer. There is no suggestion that intervention is not allowed when requested. To ensure that affected persons are aware of suits filed in the District of Columbia, a simple notice requirement is all that is needed. Furthermore, to remove any doubt that intervenors may request a change of venue, explicit language to that effect can be added to 28 U.S.C. 1404.

(g) With respect to venue in the courts of appeals, the need for authoritative determinations on nationally applicable statutes or regulations may argue for exclusive review in the District of Columbia Circuit. (See Recommendation 76-4, "Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act.") However, Congress should review all such existing provisions to decide on a statute by statute basis whether such exclusivity is warranted.

(h) There is no question that some proponents of changes in the venue laws believe that the place of hearing is likely to affect the outcome and believe further that courts of "local" districts will be more sympathetic than the courts of the District of Columbia to the local interests for which they profess to speak. No doubt, some of the opponents of such changes perceive an advantage to their interests in their ability to sue in the District of Columbia.

The Conference is aware from its consideration of the race-to-the-courthouse recommendation, No. 80-5, that lawyers do act on perceptions of advantage based on venue even within a single United States court system and a single body of federal law. The Conference cannot deny the existence or the importance of the perception of advantage to a party from the choice of one court over another. We suggest, however, that, to the extent that the concern of proponents is actually with the terms and construction of certain federal statutes, the proper objective should be the forthright amendment of the statutes, not manipulation of the law of venue in order to achieve more favorable construction.

Traditionally, one has been able to sue the Government at its seat. Indeed, it took the mandamus and venue statute of 1962, which added section 1391(e) to the Code, to provide a solid basis for suing the Government

venue provisions in the Clean Air Act and Federal Water Pollution Control Act were addressed in Recommendation 76-4 (national standards should be reviewed exclusively in the D.C. Circuit; rules affecting single states or facilities should be reviewed in the local circuit). "Races" to the courts of appeals were addressed in Recommendation 80-5.

elsewhere. Perceived differences in the predilections of particular courts, which are likely to be transient if they exist at all, are not a reason for departing from our tradition.

There may be particular statutory contexts in which local considerations are so likely to predominate in a certain category of suits against the Government, that such suits should be heard in local districts. Thus, while this recommendation opposes across the board restrictions on venue choices, the Conference does not oppose the reexamination of the allowable venue of proceedings to review agency actions under particular statutes.

RECOMMENDATIONS

(1) Congress should not amend the statutes governing venue in district court actions against the United States, its agencies, or its officials, 28 U.S.C. 1391(e), 1404(a), or the statute governing direct review of agency orders in the courts of appeals, 28 U.S.C. 2112(a), to make the extent of local impact determinative of proper venue.

(2) Congress should add a new subsection (g) to 28 U.S.C. 1391 to provide that plaintiffs filing actions in the United States District Court for the District of Columbia against the United States, its agencies, or its officials that may have a particular impact on the residents of other districts be required to notify the attorneys general of the states containing such districts.

(3) Congress should amend the district court transfer provision, 28 U.S.C. 1404(a), to provide explicitly that intervenors may request a transfer.

(4) Congress should review existing statutes providing for review of federal agency orders or regulations exclusively in the District of Columbia Circuit to ensure that, in each statute, considerations of the need for authoritative determinations on nationally applicable requirements outweigh the benefits of providing litigants with a choice of forums for challenging agency action. Pending such a review, however, Congress should not enact legislation overriding all exclusive venue provisions.

EDITORIAL NOTE: Two separate statements were filed concerning this recommendation. The text appears in the *FEDERAL REGISTER*.

[47 FR 30706, July 15, 1982]

§ 305.82-4 Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4).

The complexity of government regulation has increased greatly compared to that which existed when the Administrative Procedure Act was enacted, and this complexity has been accompanied by a formalization of the rulemaking process beyond the brief, expeditious notice and comment procedures envisioned by section 553 of the APA. Procedures in addition to notice and comment may, in some instances, provide important safeguards against arbitrary or capricious decisions by agencies and help ensure that agencies develop sound factual bases for the exercise of the discretion entrusted them by Congress, but the increased formalization of the rulemaking process has also had adverse consequences. The participants, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay result, and participation in rulemaking proceedings can become needlessly expensive. Moreover, many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.

Participants in rulemaking rarely meet as a group with each other and with the agency to communicate their respective views so that each can react directly to the concerns and positions of the others in an effort to resolve conflicts. Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute. For example, highly technical standards are negotiated that have extensive health, safety, and economic effects; lawsuits challenging rules are regularly settled by agreement on a negotiated rule; public law litigation involves sensitive nego-

tiation over rule-like issues; and many environmental disputes and policies have been successfully negotiated. These experiences can be drawn upon in certain rulemaking contexts to provide procedures by which affected interests and the agency might participate directly in the development of the text of a proposed rule through negotiation and mediation.

The Federal Advisory Committee Act (FACA) has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations. Without proposing a general revision of FACA, the Administrative Conference urges that Congress amend the Act to facilitate the use of the negotiating procedures contemplated in this recommendation.

The suggested procedures provide a mechanism by which the benefits of negotiation could be achieved while providing appropriate safeguards to ensure that affected interests have the opportunity to participate, that the resulting rule is within the discretion delegated by Congress, and that it is not arbitrary or capricious. The premise of the recommendation is that provision of opportunities and incentives to resolve issues during rulemaking, through negotiations, will result in an improved process and better rules. Such rules would likely be more acceptable to affected interests because of their participation in the negotiations. The purpose of this recommendation is to establish a supplemental rulemaking procedure that can be used in appropriate circumstances to permit the direct participation of affected interests in the development of proposed rules. This procedure should be viewed as experimental, and should be reviewed after it has been used a reasonable number of times.

RECOMMENDATION

1. Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.

2. Congress should facilitate the regulatory negotiation process by passing legislation explicitly authorizing agencies to conduct rulemaking proceedings in the manner described in this recommendation. This authority, to the extent that it enlarges existing agency rulemaking authority, should be viewed as an experiment in improv-

ing rulemaking procedures. Accordingly, the legislation should contain a sunset provision. The legislation should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings, as contemplated in this recommendation, free of the restrictions of the Federal Advisory Committee Act and any ex parte limitations. Legislation should provide that information tendered to such groups, operating in the manner proposed, should not be considered an agency record under the Freedom of Information Act.

3. In legislation authorizing regulatory negotiation, Congress should authorize agencies to designate a "convenor" to organize the negotiations in a particular proceeding. The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff. The convenor would be responsible for (i) advising the agency as to whether, in a given proceeding, regulatory negotiation is feasible and is likely to be conducive to the fairer and more efficient conduct of the agency's regulatory program, and (ii) determining, in consultation with the agency, who should participate in the negotiations.

4. An agency considering use of regulatory negotiation should select and consult with a convenor at the earliest practicable time about the feasibility of its use. The convenor should conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empanelled to develop a proposed rule relating to the particular topic. The convenor should consider the risks that negotiation procedures would increase the likelihood of a consensus proposal that would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition. Other factors bearing on this decision include the following:

(a) The issues to be raised in the proceeding should be mature and ripe

for decision. Ideally, there should be some deadline for issuing the rule, so that a decision on a rule is inevitable within a relatively fixed time frame. The agency may also impose a deadline on the negotiations.

(b) The resolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances. Rather, issues involving such fundamental tenets should already have been determined, or not be crucial to the resolution of the issues involved in writing the proposed regulation.

(c) The interests significantly affected should be such that individuals can be selected who will adequately represent those interests. Since negotiations cannot generally be conducted with a large number of participants, there should be a limited number of interests that will be significantly affected by the rule and therefore represented in the negotiations. A rule of thumb might be that negotiations should ordinarily involve no more than 15 participants.

(d) There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement by attempting to optimize the return to all the participants.

(e) No single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess this power solely by virtue of the agency's ultimate power to promulgate the final rule.

(f) The participants in the negotiations should be willing to negotiate in good faith to draft a proposed rule.

(g) The agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear to the other participants that he or she cannot bind the agency.

5. If the convenor determines that regulatory negotiation would be appropriate, it would recommend this procedure to the agency. If the agency and the convenor agree that regulatory negotiation is appropriate, the

convenor should be responsible for determining preliminarily the interests that will likely be substantially affected by a proposed rule, the individuals that will represent those interests in negotiations, the scope of issues to be addressed, and a schedule for completing the work. It will be important for potential participants to agree among themselves as to these matters, and their agreement can be facilitated by either the convenor or a possible participant conducting a preliminary inquiry among identified interests. Reasonable efforts should be made to secure a balanced group in which no interest has more than a third of the members and each representative is technically qualified to address the issues presented, or has access to qualified individuals.

6. The subject matter of the proposed regulation may be within the jurisdiction of an existing committee of a non-governmental standards writing organization that has procedures to ensure the fair representation of the respective interests and a process for determining whether the decision actually reflects a consensus among them. If such a committee exists and appears to enjoy the support and confidence of the affected interests, the convenor should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations. In such a case, the existing committee could be regarded as a regulatory negotiation group for purposes of this recommendation. (Alternatively, the product of the committee could be used as the basis of a proposed regulation pursuant to Administrative Conference Recommendation 78-4.⁹)

7. To ensure that the appropriate interests have been identified and have had the opportunity to be represented in the negotiating group, the agency should publish in the FEDERAL REGISTER a notice that it is contemplating developing a rule by negotiation and

⁹ Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1978 ACUS Recommendations and Reports 13, 1 CFR 305.78-4.

indicate in the notice the issues involved and the participants and interests already identified. If an additional person or interest petitions for membership or representation in the negotiating group, the convenor, in consultation with the agency, should determine (i) whether that interest would be substantially affected by the rule, (ii) if so, whether it would be represented by an individual already in the negotiating group, and (iii) whether, in any event, the petitioner should be added to the negotiating group, or whether interests can be consolidated and still provide adequate representation.

8. The agency should designate a senior official to represent it in the negotiations and should identify that official in the **FEDERAL REGISTER** notice.

9. It may be that, in particular proceedings, certain affected interests will require reimbursement for direct expenses to be able to participate at a level that will foster broadly-based, successful negotiations. Unlike intervenors, the negotiating group will be performing a function normally performed within the agency, and the agency should consider reimbursing the direct expenses of such participants. The agency should also provide financial or other support for the convenor and the negotiating group. Congress should clarify the authority of agencies to provide such financial resources.

10. The convenor and the agency might consider whether selection of a mediator is likely to facilitate the negotiation process. Where participants lack relevant negotiating experience, a mediator may be of significant help in making them comfortable with the process and in resolving impasses.

11. The goal of the negotiating group should be to arrive at a consensus on a proposed rule. Consensus in this context means that each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition. Following consensus, the negotiating group should prepare a report to the agency containing its proposed rule and a concise general statement of its basis and purpose. The report should also describe

the factual material on which the group relied in preparing its proposed regulation, for inclusion in the agency's record of the proceeding. The participants may, of course, be unable to reach a consensus on a proposed rule, and, in that event, they should identify in the report both the areas in which they are agreed and the areas in which consensus could not be achieved. This could serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities, and identify potentially acceptable solutions.

12. The negotiating group should be authorized to close its meeting to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced.

13. The agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking. If the agency does not publish the negotiated text as a proposed rule, it should explain its reasons. The agency may wish to propose amendments or modifications to the negotiated proposed rule, but it should do so in such a manner that the public at large can identify the work of the agency and of the negotiating group.

14. The negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified. The final responsibility for issuing the rule would remain with the agency.

[47 FR 30708, July 15, 1982]

§ 305.82-5 Federal Regulation of Cancer-Causing Chemicals (Recommendation No. 82-5).

The following recommendations broadly address the procedures by which Federal agencies identify, evaluate, and regulate substances that pose a potential risk of human cancer. For many years these regulatory activities have been among the most controversial engaged in by Federal agencies. They implicate important health and economic values and attract the interest of groups throughout society. Some of the issues dealt with in these recommendations

are not peculiar to the context of carcinogen regulation. The statutory procedures agencies follow in regulating human exposure to cancer hazards, for example, are applicable to many other environmental and health hazards. While these recommendations may thus have broader application or impact, they are based on an evaluation of agency performance in this context alone.

I. PRIORITY SETTING

Estimates of the number of chemicals that may pose a risk of human cancer describe a universe larger than government agencies can evaluate or regulate. Agency resources for scientific review and regulatory proceedings are shrinking, and the capacity of manufacturers and users of chemicals to implement costly controls is likewise limited. In these circumstances, attention should be concentrated on those chemicals that pose the greatest risks and can be controlled most economically. As agencies have increasingly recognized, accomplishing this objective requires establishment of priorities.

Priority setting should be part of any program directed at determining the health effects of chemicals, as well as of programs designed to establish exposure limits. Each regulatory agency should set its own priorities, but there is also value in interagency selection of candidates for regulation and, particularly, for further testing.

Although candidates for evaluation and regulation should be carefully selected, any ranking based on abstract criteria, however rational, will be vulnerable to new information about human exposure or health effects and to public concerns. Agencies should explain departures from established priorities, but should retain flexibility to respond to new problems.

Criteria for selecting candidates for regulation should include the extent of the hazard posed by a chemical—a function of its potency, the conditions of exposure, and the number of people exposed. The extent of the hazard can often be expressed in quantitative terms. Agencies should also consider the effectiveness and cost of alternative control measures as well as other effects of regulation. Estimates of the cost-effectiveness of regulating specific chemicals can be helpful in selecting priorities. Because of the complexity of these criteria and the continuing need to obtain additional information, selection of candidates for regulation will often be an iterative process.

Priority setting should be a public process which affords interested persons an opportunity to communicate their own views to the agency. Varied techniques exist short of rulemaking under the Administrative Procedure Act for providing such opportunities, including public meetings, use of expert ad-

visory panels, and publication in the *FEDERAL REGISTER* of invitations to submit data and views. Under whatever system, preliminary rankings risk being misinterpreted as definitive judgments about the hazards of chemicals before manufacturers and users have had an opportunity to present evidence or arguments. Accordingly, agency announcements of priorities should make clear the tentative character of underlying scientific assessments and describe the opportunities for interested persons to supply contrary or confirmatory information.

RECOMMENDATION

1. To the extent compatible with other demands on their resources, agencies should establish and follow systems for ranking chemicals as candidates for scientific evaluation or regulation. Agencies should generally adhere to the priorities thus established, but must retain the flexibility to respond to new hazards or to public concerns about other chemicals.

2. Priority setting should be part of selecting chemicals (a) for further testing, (b) for intensive scientific and regulatory evaluation, and (c) for administrative action to limit or eliminate exposure.

3. To the extent allowed by law, priorities should be set by agencies with the objective of maximizing the net benefits to society of agency action. Thus, in setting priorities, the agency should consider the expected benefits and costs of various alternatives. Although the criteria for selecting chemicals for further testing may be different, the criteria for selecting chemicals for regulation should take account of the health hazards posed by chemicals, including the potency of the chemicals, levels of exposure, the number of people likely to be exposed, and the costs and cost-effectiveness of methods for controlling exposure, to the extent that these may be known.

4. Because agencies differ in their functions and their selection of candidates for evaluation and regulation must be coordinated with other agency programs, each agency should establish its own priorities. The several agencies responsible for regulating carcinogens should, however, periodically compare their rankings and, where feasible, coordinate their testing, evaluation, and regulatory efforts.

Consultation with scientific, industrial, and public interest organizations should be encouraged.

5. Agency procedures for setting priorities should permit interested members of the public to submit information and views concerning specific candidates. Agencies should consider adopting priority-setting systems through rulemaking, but more informal methods are appropriate for ranking individual chemicals for evaluation and regulation. Any agency announcement that a product or chemical is a candidate for further evaluation or for regulation should explain both the bases of that assessment and its preliminary nature and should describe available procedures for confirming or negating its preliminary conclusions.

II. INTERAGENCY COORDINATION

Responsibility for regulating chemicals that pose a risk of human cancer is shared by several agencies, including most notably the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), Food and Drug Administration (FDA), and Consumer Product Safety Commission (CPSC). Only in recent years have these agencies attempted to coordinate their activities to assure consistency and enhance the benefits of regulation. While the agencies' criteria for identifying and evaluating potential carcinogens have in fact not been conflicting, their decisions have sometimes appeared difficult to reconcile, usually because of differences in legislation.

The creation of the Interagency Regulatory Liaison Group in 1977 rested on the premises that Federal regulation of chemical carcinogens should proceed from common principles of scientific evaluation and should be coordinated administratively. While these premises remain valid, other mechanisms may be equally effective in assuring coordination. Opportunities for productive coordination exist in several areas: establishment of government-wide principles of scientific evaluation; agreement on test guidelines for toxicological experiments and other studies of health effects; ranking of chemicals for testing; and monitoring and enforcement of exposure controls.

The four agencies have on several recent occasions cooperated in the regulation of specific chemicals. They once assembled a central scientific working group to evaluate formaldehyde, a chemical of common interest, and they agreed on a common list of chemicals that were high priorities for coordinated regulation. Though diverse statu-

tory procedures have sometimes discouraged joint administrative proceedings, opportunities at the preproposal stage for cooperation in evaluating health effects and performing economic analysis have not yet been fully exploited.

RECOMMENDATION

1. Interagency coordination in identifying, evaluating, and regulating potential human carcinogens should be encouraged. Effective coordination can reduce governmental costs, minimize inconsistency among the agencies, and better illuminate the economic costs of alternative control options.

2. Agencies should continue to cooperate in identifying chemicals for which further testing is needed to permit regulatory assessments. The National Toxicology Program should continue to elicit joint agency rankings of candidates for testing.

3. Regulatory agencies should collaborate with government scientific bodies, including the National Toxicology Program, National Institute of Environmental Health Sciences, and National Center for Toxicological Research, to obtain agreement on guidelines for the conduct and evaluation of toxicological tests. This effort need not result in public rulemaking to adopt test protocols, but scientists outside government should have an opportunity to contribute to the development of test guidelines. Cooperative guidelines should also be considered for short-term tests and epidemiological studies, but current guidelines should not discourage development of improved test methods.

4. To the extent permitted by statute, agencies responsible for regulating carcinogens should adhere to common criteria for evaluating and interpreting health effects data. Agencies should avoid inconsistency in their approaches to mixed scientific-policy issues, such as whether to assume a no-threshold model of carcinogenesis, whether to perform quantitative estimates of human risk, or whether to allow evidence that a chemical produces an increase in cancer in laboratory animals through mechanisms that do not suggest human risk.

5. Agencies responsible for regulating carcinogens should continue to explore joint evaluation of the potential health hazards of chemicals that are candidates for regulation by more than one agency, for instance, by use of a multi-agency advisory panel for any particular substance.

6. Agencies should explore other opportunities to collaborate before the initiation of formal administrative proceedings to regulate a chemical. These may include joint development of exposure estimates and joint preparation of economic analyses of alternative regulatory approaches.

7. Agencies should, after eliciting the views of interested persons, consider conducting joint administrative proceedings when they contemplate regulating the same chemical. Statutory diversity may, however, complicate or even preclude such proceedings.

III. CHEMICAL SELECTION AND GUIDELINES FOR TESTING AND EVALUATION

The selection of chemicals for study, the design of protocols for laboratory experiments, and the establishment of criteria for interpreting study results are important parts of the process for regulating substances that pose a risk of human cancer. These are essentially scientific functions which should not be dictated by narrow policy considerations. The important desiderata are scientific integrity and consistency.

At the same time, it remains true that much toxicological testing performed in the United States—by government laboratories and by or on behalf of private industry—is performed to aid regulatory decisionmaking. Numerous toxicological studies are performed to support marketing approval for food additives, pesticides, and pharmaceuticals. FDA and EPA have both conducted similar studies on substances within their regulatory jurisdiction. The agencies have also relied on studies commissioned by the National Cancer Institute. The NCI bioassay program has more recently fallen under the supervision of the National Toxicology Program, whose supervisory board includes representatives of the regulatory agencies. NTP currently accepts nominations of chemicals for testing from the agencies.

Under the auspices of the former Inter-agency Regulatory Liaison Group, the four agencies studied here (EPA, OSHA, FDA, and CPSC) actively sought agreement on joint protocols for toxicological testing and on criteria for evaluation of study results.

RECOMMENDATION

1. In conjunction with the National Toxicology Program and in consultation with scientific organizations outside government, regulatory agencies should continue efforts to develop consistent guidelines for toxicological testing. These test guidelines should reflect current scientific consensus but also awareness of the resource limitations that constrain both government and industry. The guidelines developed or espoused by the agencies should not be issued as formal regulations. Rulemaking would needlessly prolong the process of reaching agreement, and formal regulations would limit the ability of agencies, producers, and testing laboratories to design protocols or adapt existing guidelines to new circumstances.

2. Agencies should adhere to similar test guidelines and similar criteria for interpreting test results. Any departure from common standards should be specifically and convincingly justified.

3. The National Toxicology Program should continue to encourage the participation of EPA, OSHA, FDA, and CPSC in its selection of chemicals for testing. It should be willing, on request, to assist agencies in their evaluation of study findings. The NTP special working group to evaluate the carcinogenicity of formaldehyde for all of the four regulatory agencies represents one promising experiment in the effort to assure consistency among the agencies.

IV. ADVISORY PANELS

Assessment of the health risks posed by chemicals requires substantial information about their toxicity and about the conditions under which humans are exposed to them, as well as understanding of the techniques for obtaining such information. Techniques for toxicological evaluation, exposure estimation, and quantitative assessment of human risk increasingly demand state-of-the-art expertise. Evaluation of potential human carcinogens also requires impartiality in assessing the quality and interpreting the results of toxicological and epidemiological studies. In the scientific world, new research findings are customarily exposed to peer review before they become accepted as reliable. Increasingly, regulatory agencies have concluded that the data on

which they rely, and the interpretations they give these data, should be subjected to peer review before becoming the bases for regulatory decisions.

Several proposals have recently been advanced to mandate and institutionalize this peer review function. Some of these proposals call for strict separation of risk assessment from the process of evaluating and selecting regulatory options. These proposals raise difficult issues respecting the design of procedures for administrative decisionmaking about chemical carcinogens. The function of assessing risk can be distinguished analytically from the choice of regulatory responses, but separating them in practice is more difficult. The close relationships among issues of toxicity, exposure, and the cost of controls make the process of agency evaluation an interactive one. Accordingly, mechanisms for exposing agency judgments to peer review should be flexible enough to permit frequent interchange with agency policy makers.

One method that agencies have successfully used for institutionalizing peer review is consultation with expert advisory panels. These panels have taken several forms, ranging from informal working groups of agency scientists assigned to review a single chemical to standing committees of independent experts who advise on numerous candidates for regulation. Advisory panels can contribute objectivity as well as expertise to agency decisions. Their advice has sometimes prevented erroneous regulatory actions; more frequently, their role has been to illuminate complex issues and enhance the quality, and thus the credibility, of agency scientific analysis.

Advisory panels comprised in whole or in part of non-Federal employees are governed by the Federal Advisory Committee Act (FACA), unless exempted by specific legislation. The FACA requires individual chartering and biennial reapproval and mandates practices that are designed to assure the balance, openness, and integrity of advisory committees. Most of these requirements are salutary, and the following recommendations endorse their observance by panels even where not formally subject to the FACA. Certain of the Act's provisions, however, have discouraged agencies from seeking outside peer review. The recommendations advanced here are intended to encourage agency resort to expert advisory panels without necessarily endorsing every requirement of the FACA. None of these recommendations should be construed as superseding either that Act, where applicable, or Federal conflict of interest laws.

RECOMMENDATION

1. Peer review of experimental findings and scientific judgments is an im-

portant means of validating the technical bases of regulatory decisions concerning carcinogens. To the extent compatible with existing law, agencies should structure their decisional processes to incorporate mechanisms for scientific peer review.

2. Expert advisory panels represent one valuable means for obtaining scientific peer review of agency decisions. Advisory panels can provide information that will aid agencies in setting priorities, in evaluating scientific data prior to initiation of administrative proceedings, and in evaluating evidence submitted by interested persons during public proceedings.

3. The design, composition, and operation of an advisory panel should fit the function it is to perform; no uniform approach is optimal. A standing advisory panel, with responsibility for reviewing the scientific bases of major actions by a particular program, can contribute consistency in addition to expertise, and it provides a ready forum for agency consultation. To assure that the panel has access to relevant expertise, sub-units can be appointed to evaluate specific chemicals or issues. An agency that lacks a standing advisory panel, however, should not forgo opportunities to create ad hoc panels to review the scientific bases of contemplated regulatory actions.

4. The role of an expert advisory panel may embrace evaluating data concerning the health effects of chemicals, interpreting those data and characterizing the chemicals' effects, and estimating the likely frequency of those effects under different exposure conditions. When an agency rejects an advisory panel's scientific judgment, it should explain the bases for that rejection. When an agency selects a regulatory approach whose bases appear inconsistent with a panel's advice, it should explain the legal, social, or other reasons that dictate or justify that choice.

5. Members of an expert advisory panel should be selected primarily for their expertise in relevant scientific fields. Qualified scientists, even if employed by the agency they are to advise, by other government agencies, or by commercial organizations, may

appropriately be selected to serve on advisory panels. In the selection of panel members, attention should be given to assuring balance in scientific orientation and viewpoint. The organizational affiliations of all panel members should be a matter of public record. The financial holdings and relationships of potential panel members should be carefully screened by the appointing officials and periodically reviewed thereafter to prevent conflicts of interest. If a panel includes members who are not disinterested with respect to a particular substance, those members should not participate in the panel's discussions of that substance.

6. Advisory panels should be accessible for consultation by the appointing agency at frequent intervals and on short notice. Consultation should usually occur before any announcement of a plan to regulate a chemical. Even when the Federal Advisory Committee Act does not apply, many of its requirements represent appropriate guides for the operation of advisory panels. Referrals of issues to advisory panels and meetings of agency officials with panel members should be matters of public record. Advance public notice of panel meetings should be provided where practicable. Panels should meet in open session except when reviewing data that are entitled to confidential treatment or, unless restricted by statute, when the panel members vote to close their deliberations. All panel conclusions and recommendations should be reduced to writing and become a part of the material to be considered in any ensuing administrative proceeding.

7. Advisory panels established to evaluate scientific data for, and provide advice to, more than one agency may often be useful. Such panels can be particularly valuable in recommending chemicals for further study or testing. Where a chemical is of interest to more than one regulatory agency, a single advisory panel may be an efficient way of obtaining an independent assessment of its potential health effects. Interagency panels should be subject to the same restrictions as to composition, operation, and

scope of responsibility as panels appointed to serve a single agency.

V. GENERIC RULEMAKING

Agencies responsible for regulating potential carcinogens have attempted to develop and publish criteria for evaluating scientific data that underlie their decisions. These efforts have included informal statements of policy, proposed interpretative regulations, binding substantive standards, and interagency policy statements. The motives underlying these efforts to establish a framework for evaluating evidence concerning individual chemicals have been as diverse as the forms they have taken. One objective has been to obtain agreement among the agencies on the scientific criteria and policies that inform regulation of carcinogens. Another objective has been to improve understanding, among the public and within agency staffs, of the principles that guide agency decisions. Some agencies have also attempted to frame these principles as rules of decision in order to forestall repetitive disputes in proceedings to regulate individual chemicals.

The desirability of assuring agency adherence to common principles of scientific interpretation seems clear. Equally important is conformity of these principles with the best current understanding of the mechanisms of carcinogenesis, of toxicological and epidemiological research, and of quantitative risk assessment. Attempts to treat decisional guides as though they were binding substantive rules may conflict with the need to remain sensitive to developments in rapidly changing fields.

The efforts of individual agencies to establish criteria for identifying and evaluating potential human carcinogens have been criticized on several counts. In addition to disputing the content of agency judgments, industry critics have questioned the appropriateness of analytic frameworks that discourage individualized assessment of the capacity of chemicals to cause cancer. The duration of agency rulemaking proceedings suggests difficulty in obtaining scientific agreement in this area, but the controversy more often betrays disagreement over agency policy judgments rather than over their distillation of scientific consensus.

RECOMMENDATION

1. In appropriate cases generic rules legitimately may be the basis for summary administrative resolution of recurrent issues, provided they do not foreclose reexamination of scientific conclusions respecting carcinogenicity of particular substances. Agencies

should proceed cautiously in using this technique because the complexity and uncertainty of the issues involved and continuing advances in scientific understanding of the mechanisms of human cancer impede development of binding general principles.

2. Agencies should be encouraged to develop systematic statements of the principles that they will apply in identifying, ranking, and evaluating chemicals that may pose a risk of human cancer. The systematizing process should ordinarily involve opportunity for submission of data and views by interested persons outside the agency. Whenever an agency expects to limit argument over principles that will guide decisions in proceedings to regulate individual chemicals, compliance with statutory requirements for rule-making is essential before the principles are formulated.

3. Agency statements may appropriately address the design and interpretation of scientific studies, the measurement or estimation of human exposure, the performance of quantitative risk assessment, and the selection of regulatory responses. These statements should attempt to distinguish between elements that are intended to summarize current scientific consensus and others that represent policy judgments reached in the absence of consensus. Policy judgments are an inevitable component of regulatory decisions and, where similar issues arise recurrently, are appropriately resolved on a generic basis. But where scientific developments in the near term are likely to require modification, or where individual studies or chemicals are often likely to deviate from the "norm," they should not be framed as binding rules.

4. Many issues involved in identifying, evaluating, and regulating potential carcinogens are common to all agencies and should be resolved consistently. These issues range from the criteria for interpreting scientific studies to the selection of mathematical models for estimating human risk. Though scientific uncertainty surrounding many of these issues requires considerations of value and policy, disparate agency responses should be avoided or convincingly justified.

VI. QUANTITATIVE ASSESSMENT OF RISK

Various pressures and incentives have encouraged regulatory agencies to explore methods for quantifying the risk of potential carcinogens. At the same time the use of quantitative risk assessment in making regulatory decisions has provoked fierce controversy. Industrial interests have generally urged agencies to regard quantification as an essential step in evaluating measures for controlling carcinogens. Consumer groups and labor unions, on the other hand, have cautioned against excessive reliance on techniques whose reliability remains uncertain. The agencies themselves have for some time had difficulty reaching consensus on the issue.

Criticism of quantitative risk assessment stems in part from doubts about its reliability. Reliance on animal models as qualitative predictors of human risk often may be unavoidable, and the further extrapolation from effects observed at high doses to the unmeasurable effects predicted at low doses compounds uncertainty. Critics also point to the wide range of risks at low doses predicted by different extrapolation models. A further criticism is that quantitative risk assessment can too easily be exploited to compute the dollar value implicitly assigned by regulators to human life.

Despite these criticisms, quantitative risk estimation has an appeal for both analysts and decisionmakers. Without some means of describing the magnitude of the health effects associated with exposure to a carcinogen an agency must find some other basis for deciding what controls to require. Legislation sometimes provides an answer. The Delaney Clause, for example, makes quantification of the risk of a carcinogenic food additive superfluous. Under any statute that permits or instructs the agency to weigh the costs against the health consequences of alternative means of controlling exposure, however, a method to quantify risks has proved essential.

Quantitative risk assessment can help illuminate many of the choices that agencies confront in regulating carcinogens. Even with its uncertainties, the technique facilitates comparison of the risks posed by different substances, which can aid in establishing priorities for regulation. Similarly, quantitative risk assessment can illuminate the choice among diverse regulatory options. A common unit of measurement for evaluating the health benefits of different options can materially advance analysis of a multidimensional decision even if the measurements are unverifiable and the benefits are not converted into dollars.

RECOMMENDATION

1. Quantitative risk estimates can be valuable in setting priorities for regulation of carcinogens, comparing the human health consequences of alternative control measures, and in analyzing the costs and benefits of regulatory options. To the extent regulatory statutes allow and available data permit, agencies should attempt to estimate and describe the magnitude of the risk posed by prevailing levels of exposure to substances considered for regulation. Within the same constraints, agencies should also attempt to describe the size of the health benefits provided by measures required to reduce or eliminate human exposure.

2. Given the limitations of techniques for quantitative risk assessment and different statutory criteria for limiting or eliminating exposure, risk estimates ordinarily will be only one consideration. The weight accorded such estimates should reflect:

(a) The statutory criteria governing agency decisions;

(b) The adequacy of available data on carcinogenic potency and on the type, levels, and duration of human exposure; and

(c) The acceptance of the methods used to estimate future health effects.

3. Any description of the magnitude of the risk associated with prevailing exposures or of the estimated health benefits of exposure controls should explicitly identify:

(a) The toxicological, epidemiological, and exposure data on which it rests;

(b) The assumptions underlying any extrapolations from animals to man or from high to low exposure levels;

(c) Other assumptions about the behavior of the substance or about the characteristics of human exposure to it; and

(d) The range of uncertainty associated with the estimates.

4. Quantitative estimates of risk associated with exposure to a substance—particularly when expressed in terms of lives likely to be lost or cases of cancer likely to occur—have a power to captivate public and press attention. Such estimates should be accompanied by statements stressing their imprecision and uncertainty.

When the available health effects data are seriously deficient or little is known about human exposures to a substance, the risk of misinterpretation may justify an agency decision not to attempt quantitative estimates of risk or health benefits.

VII. PUBLIC PARTICIPATION

Several values are served by public participation in the regulatory process. Perhaps preeminent is the value of fairness to those who may be directly affected by government action. The "right to be heard" before government acts adversely to important private interests is well established in American administrative law. This is reflected in the Administrative Procedure Act and by most regulatory statutes.

A second purpose served by broad public participation in agency decisionmaking is avoidance of mistaken even though well intentioned judgments that rest on incomplete information. In the context of carcinogen regulation this value enjoys a high rank. Decisions concerning human exposure to potential carcinogens should rest on sound scientific and economic judgments. Estimates of risk and cost require information that agencies often lack, as well as analytical skills that are found in industry and many public interest organizations. Accordingly, agency procedures should facilitate participation by those in the private sector with relevant scientific and economic expertise.

A third important value served by public participation is balance. Agency decisions concerning environmental health hazards require government to take large chances with both human life and private business. Data are invariably inadequate and estimates of future consequences are problematic; these uncertainties simply complicate an already difficult task. Determining the appropriate level of human exposure to a substance reasonably found to cause cancer is fundamentally a normative exercise in which there are no experts. Because decisions are left to regulators with sometimes scant Congressional guidance, agency procedures should facilitate broad participation and vigorous debate to assure agency understanding of diverse viewpoints.

Finally, the opportunity to influence agency thinking, coupled with an awareness that agency procedures permit broad participation, contributes to the acceptability of agency decisions.

Public health or scientific interests may not have participated in the regulatory process on equal footing with commercial interests. The extent to which this disparity, if it exists, is a function of lack of re-

sources and whether it should be addressed through public funding of citizen participation are questions that transcend carcinogen regulation. The arguments for and against funding should be considered in the broader context.

RECOMMENDATION

1. In setting exposure limits for carcinogens, agencies ordinarily should follow procedures that assure opportunities for all affected interests, commercial and non-commercial alike, to submit information and views before final decisions are reached. Procedures may appropriately vary with the requirements of agency organic statutes, with the characteristics of the activity or products whose regulation is contemplated, and with the need for prompt action to limit exposure.

2. Agencies should encourage and facilitate the participation of independent experts in toxicology, epidemiology, risk and exposure estimation, and other relevant technical disciplines. A useful way of eliciting participation in the regulatory process by independent scientists is through the use of standing or ad hoc advisory panels.

3. Congress should refrain from imposing procedural requirements, such as section 701(e) of the Federal Food, Drug, and Cosmetic Act, which are so burdensome that agencies search for regulatory approaches that have the effect of precluding effective participation in their decisionmaking processes by affected interests.⁴

[47 FR 30710, July 15, 1982]

§ 305.82-6 Federal Officials' Liability for Constitutional Violations (Recommendation No. 82-6).

This recommendation focuses on the increasing risk to Federal executive branch officials of civil liability for monetary damages for alleged violations of Federal constitutional rights. This vulnerability has expanded dramatically in recent years, as a

result of judicially-discovered rights enunciated in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and subsequent court cases involving allegations of official misconduct. Under the present system of officials' liability, as developed piecemeal by the courts, an individual Federal employee (except certain categories of officials, including the President, who have been ruled to have absolute immunity) may be held personally liable for acts that, though committed while the employee was acting within the scope of office or employment, may subsequently be found to violate a constitutional provision. Juries may hold officials liable for actual damages where they cannot show that their actions were taken in good faith—that is, in the belief that their conduct was lawful—and for punitive damages where they are shown to have acted maliciously or with reckless disregard of the plaintiff's constitutional rights. At present, damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may or may not be stated against the Government under the Federal Tort Claims Act, 28 U.S.C. 2671-2680.

The existing system of civil sanctions for constitutional violations by Federal officials does not provide adequate assurance of compensation for victims of such violations and discourages proper conduct by Government officials. In addition, the Federal Government often has interests at stake in constitutional tort litigation involving its officials which may not be represented adequately when individual officials themselves are the defendants on trial.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court suggested that the courts may properly refuse to entertain monetary damage actions against Federal officials if Congress has expressly substituted a different remedy or made available an alternative to the *Bivens* remedy. In the Conference's view, such an alternative system is likely to improve the effectiveness with which Federal programs and laws are administered.

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional violations assertedly committed by Federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should replace the existing system by accepting public liability for wrongs done in the public's name and by strengthening the means of dealing with the wrongdoers. When defending against constitutional tort claims, the Government should be able to assert any immunity or good faith defense available to the officials.

⁴ See also Administrative Conference Recommendation 71-7 (Rulemaking on a Record by the Food and Drug Administration), 2 ACUS Recommendations and Reports 42 (1973); and Recommendation 72-5 (Procedures for the Adoption of Rules of General Applicability), 2 ACUS Recommendations and Reports 66 (1973), 1 CFR 305.72-5.

Since the Conference's mandate extends only to matters affecting the administration of Federal agencies' programs, this recommendation addresses only actions against executive agency officials. We do not intend to suggest that the same considerations do not apply to officials of the legislative and judicial branches.

RECOMMENDATION

1. Congress should enact legislation providing that the United States shall be substituted as the exclusive party defendant in all actions for damages for violations of rights secured by the Constitution of the United States committed by Federal executive branch officers and employees while acting within the scope of their office or employment. The legislation should provide adequate procedures to ensure that, where a damage action for violation of such rights is brought against an executive branch officer or employee, such action should be deemed to have been brought against the United States upon certification by the Attorney General that the defendant officer or employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose. The Attorney General's failure to make such certification should be judicially reviewable.

2. Such legislation should provide that, in actions alleging constitutional violations, the United States may assert as a defense any qualified immunity or good faith defense available to the executive branch officer or employee whose conduct gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct. The United States should also be free to assert such other defenses as may be available, including the absolute immunity of those officers entitled to such immunity.

3. The agency that employed the offending officer should be responsible for investigation and, where appropriate, for disciplining the official and implementing any other appropriate corrective measures. The Office of Personnel Management should assure, via guidance promulgated through the Federal Personnel Manual and other devices, that agencies are authorized to employ existing mechanisms to impose sanctions on officers and em-

ployees who have violated the constitutional rights of any person. Employees should be permitted to assert as a defense in any disciplinary proceeding their good faith in taking the action in question, as well as such other defenses as may be available.

4. Congressional legislation should preserve the opportunity for jury trial only with respect to claims that arose prior to the effective date of the legislation implementing this recommendation.

[47 FR 58208, Dec. 30, 1982]

§ 305.82-7 Judicial Review of Rules in Enforcement Proceedings (Recommendation No. 82-7).

A person adversely affected by an agency rule may ordinarily obtain judicial review of that rule either by instituting a direct review proceeding against the agency in an appropriate court (preenforcement review)¹ or by asserting the invalidity of the rule as a defense in a civil or criminal proceeding to apply or enforce the rule (enforcement review). Prior to the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), direct review was generally difficult to obtain because of technical defenses such as lack of ripeness or lack of standing, and most review of rules took place in the context of enforcement proceedings.

Under *Abbott Laboratories* and subsequent decisions, direct review of agency rules has become increasingly available. Congress in much recent regulatory legislation has specifically provided for immediate resort to judicial review at the conclusion of the rulemaking proceeding. As a result, direct judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding is less common. In a number of statutes, in fact, Congress has sought to encourage prompt direct review by explicitly precluding or limiting the

¹ We use the term "direct review" to refer to judicial review of a rule of general applicability before the rule is applied to a particular person in an adjudicative proceeding. Such review may be by the court of appeals pursuant to a special statutory review procedure or by the district court in the exercise of its power under the Administrative Procedure Act to review agency action not otherwise reviewable. See ACUS Recommendations 74-4 (Preenforcement Judicial Review of Rules of General Applicability) and 75-3 (The Choice of Forum for Judicial Review of Administrative Action).

availability of review at the enforcement stage.

At the same time, and perhaps largely as a result of the increasing importance of direct judicial review of rules, courts have intensified their scrutiny of the administrative process preceding promulgation of the rule. Whereas in the pre-*Abbott Laboratories* era challenges to rules were most frequently based on assertions of lack of agency authority or on inapplicability of the rule to the party's particular circumstances, today the issues in direct review proceedings increasingly include whether the agency made the proper procedural choices in the rulemaking proceeding and whether the rule finds adequate support in the administrative record.

The Administrative Procedure Act does not by its terms establish different standards of review for direct review proceedings and enforcement proceedings, and few courts have considered the implications for review in enforcement proceedings of the increasingly intensive standard developed in direct review proceedings. Moreover, in adopting statutory provisions precluding enforcement review Congress has not distinguished between these process-related objections and other types of objections to rules.

In Recommendation 76-4, the Conference criticized provisions precluding enforcement review in the Clean Air Act and the Federal Water Pollution Control Act. In view of the increasing reliance on direct review and the proliferation of issues concerning the adequacy of the rulemaking process rather than the agency's authority to promulgate a particular rule, however, the Conference now believes that limitations on judicial review of rules in enforcement proceedings may sometimes be appropriate. The purpose of this recommendation is twofold: to identify factors that Congress should consider in deciding whether to preclude enforcement judicial review, and to distinguish between types of challenges to rules that should ordinarily be covered by any preclusion provisions Congress decides to adopt and types of issues that should ordinarily remain available in enforcement proceedings even where preclusion provisions have been adopted.

Sound principles of administrative law favor prompt and dispositive resolution of disputed issues arising from an administrative rulemaking proceeding. Direct review in the court of appeals is more likely to afford such a resolution than later enforcement review in one or more district courts.² The

uncertainty caused by the potential for conflicting court decisions and by the possibility that a rule may be overturned several years after its promulgation can be extremely disruptive of the regulatory scheme. In addition, reopening a rulemaking proceeding to correct any defects will become increasingly difficult as the original record grows stale over time and the situation of the interested parties changes.

On the other hand, those affected by a rule should have a full and fair opportunity to challenge the rule on all available grounds. These interests must be balanced in determining when limitations on enforcement review of rules are appropriate. The balance will tip in favor of limitations on enforcement review when the impact of foreclosing review on those affected by a rule is the least and when the costs of regulatory uncertainty or of declaring a rule invalid after several years are the greatest. Thus one factor favoring limitations on enforcement review is the likelihood that the groups affected by rules promulgated under a particular statute will be well represented in the agency rulemaking proceeding because, for example, those groups are well defined and/or well organized. Widespread participation in the rulemaking proceeding reduces the probability that any significant issue concerning the rule, particularly one pertaining to the rulemaking process itself, will be overlooked on direct review.

The likelihood that a rulemaking proceeding will involve complex procedures or intensive factual exploration also militates in favor of limits on enforcement review. The more elaborate and formal the administrative rulemaking proceeding (such as those required by hybrid rulemaking statutes³), the more likely it is that the rule will be subject to challenge on the basis of a relatively narrow issue involving the procedures used or the record support for some aspect of the rule. As time passes, reopening such a complex proceeding after a court reversal will be increasingly burdensome. Encouraging the dispositive resolution of challenges to a rule on direct review (perhaps while effectiveness of the rule has been stayed) is also advisable when the costs of regulatory uncertainty are particularly high. Sometimes compliance with a rule entails substantial expense that will not be fully recoverable if the rule is later overturned. Simi-

peals rather than in the district court. See ACUS Recommendation 75-3.

³ See, e.g., ACUS Recommendations 79-1 (Hybrid Rulemaking Procedures of the Federal Trade Commission) and 80-1 (Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act).

² The recommendation is based on the assumption that, where Congress has provided by statute for direct review of rules, that review will ordinarily lie in the court of ap-

larly, when Congress determines that there is a need to achieve important regulatory goals promptly nationwide, or when it is particularly important that rules apply industry-wide in order to avoid unfair competitive advantage to noncomplying businesses, repeated litigation over the validity of the rules in various district courts should be avoided if possible.

Even when Congress decides that limits on enforcement review are warranted, it should not foreclose all challenges to rules at the enforcement stage. Some grounds for review can be precluded with little unfairness to parties who may be unaware of the original rulemaking proceeding or are otherwise unable to seek direct review, while others raise fundamental questions about the substance of the rule or its application in circumstances that may have been unforeseen at the time of promulgation. Challenges based on asserted errors in the administrative process are those most suitable for preclusion. When objections on procedural grounds are raised early, errors may be remedied promptly and the rulemaking process recommenced with a minimum of disruption to the interests of those affected by the rule. And objections based on asserted inadequacy of the administrative record may lose their relevance as that record itself becomes dated. These objections, moreover, do not ordinarily turn on the situation of a particular individual or entity or on a particular interpretation of the rule and can be raised as well by one party as by another.

On the other hand, considerations of fairness and judicial economy may argue for retaining a right to raise in enforcement proceedings those objections based on asserted lack of statutory authority or the inapplicability or unreasonableness of the rule as applied to the facts of the case. Moreover, there may be constitutional inhibitions against precluding or restricting at any time challenges based on the asserted unconstitutionality of a rule either on its face or as applied.

The Conference recognizes that the line between issues of process and those of statutory authority may not always be a bright one. For example, the question of whether there is statutory authority to apply a rule to a particular situation may tend to converge with the issue of the adequacy of record support for the rule. However, if the distinctions suggested below are made, statutory provisions will afford the courts adequate guidance in most situations. When ambiguity nonetheless results, the well established presumption of reviewability will continue to apply.

RECOMMENDATION

1. In drafting a statute that provides for adequate pre-enforcement judicial

review of rules, Congress should consider whether to limit the availability of review at the enforcement stage. In deciding whether to limit the availability of enforcement review in a particular statute, Congress should consider the following factors as favoring such a limitation:

(a) The likelihood that the rulemaking proceeding will attract widespread participation;

(b) The likelihood that the proceeding will involve complex procedures or intensive exploration of factual issues;

(c) The likelihood that those affected by the rule will incur substantial and immediate costs in order to comply with it; and

(d) The need for prompt compliance with the rule on a national or industry-wide basis.

2. When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the administrative record. Judicial review of issues relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant should be permitted when these issues are raised in subsequent suits or as defenses to subsequent enforcement actions (subject to the principles of collateral estoppel and stare decisis). Judicial review of issues relating to the statutory authority for the rule should be precluded at the enforcement stage only where Congress has concluded that there is a compelling need to achieve prompt compliance with the rule on a national or industry-wide basis.

3. When Congress limits the availability of judicial review of rules at the enforcement stage as described in paragraph 2, it should provide that, in an exceptional case when foreclosure of issues will work a severe hardship or otherwise produce a manifestly unjust outcome, a court may either dismiss or stay the proceedings and refer the rule to the affected agency for its reconsideration.

4. Paragraph D of Recommendation No. 76-4, 1 CFR 305.76-4, Judicial Review Under the Clean Air Act and

Federal Water Pollution Control Act, is hereby superseded to the extent that it is inconsistent with this recommendation.

(47 FR 58208, Dec. 30, 1982)

§ 305.83-1 The Certification Requirement in the Contract Disputes Act (Recommendation No. 83-1).

The Contract Disputes Act, 41 U.S.C. 601-613, enacted in 1978, established a comprehensive system for resolving disputes arising out of federal government contracts. Under the Act, disputes initiated by or brought against executive branch agencies relating to a contract must first be submitted in writing to the agency's contracting officer for decision. Appeals from that decision may then be taken either to an agency board of contract appeals or to the United States Claims Court.

The Act specifies in section 605(c) that claims submitted to the contracting officer by a contractor for more than \$50,000 must be certified: "the contractor shall certify that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." It is generally recognized that this requirement was inserted to discourage the submission of frivolous or unwarranted contractor claims. (Defense contractor claims are also subject to a second certification requirement, contained in section 813 of the Department of Defense Appropriation Authorization Act, Pub. L. 95-485, that predates the Contract Disputes Act. It requires a similar certification, but applies only to claims exceeding \$100,000.)

Decisions by the Court of Claims¹ have held the certification requirement in the Contract Disputes Act to be jurisdictional. The Court has ruled that unless a contractor has presented a proper certification to the contracting officer prior to the officer's

decision, any such decision is a nullity, and the court will dismiss any appeal based on such a decision. Moreover, the Court has intimated in dicta that agency boards of contract appeals should likewise dismiss appeals from decision on uncertified claims—a position followed in several board decisions.

This formalistic approach presents significant problems for contractors. Sometimes a contractor cannot state the exact amount of a claim at the time the claim first arises because damages have not fully accrued or because the necessary information is otherwise unavailable. Also, a contractor who believes his certification is correct when made may later discover new information affecting the amount of the claim. In these situations, under existing law, the contractor may have to return to the starting point of the whole process, at the cost of delay and added expense, if he seeks to amend his certification. Contractors have also been required to begin again, even when their cases have reached the Court of Appeals for the Federal Circuit, when contracting officers have issued decisions before receiving certification.

The Conference believes that the certification requirement serves a valid purpose—that of discouraging frivolous or unwarranted claims. However, this purpose can be achieved in the context of a more flexible certification requirement. When the exact amount of a claim is not definitely known, a contractor should be permitted to certify the validity of his claim without specifying an exact amount, providing instead his best estimate of the amount along with an explanation of why the exact amount cannot be stated. Customary standards of proof should continue to apply in establishing the precise measure of liability, including the protections available under section 694 of the Contract Disputes Act and 18 U.S.C. 1001. Where a matter is later appealed to a board of contract appeals or the Claims Court, that body should require the contractor to state an exact amount before trial on the merits.

In addition, if for any reason a contractor has failed to make certification at the proper time or in the proper amount, this failure should not automatically nullify any action already taken on the contractor's claim. On a finding that the interests of justice so require, the contracting officer, board of contract appeals, or Claims Court should have authority to permit the contractor to make or amend the certification at any time before that officer or reviewing body issues a decision on the claim.

The \$50,000 threshold, coupled with the jurisdictional certification requirement, also creates some problems. A contractor who files an uncertified claim, believing it to be worth less than \$50,000, and who then dis-

¹The Court of Claims has been replaced by the United States Claims Court and the Court of Appeals for the Federal Circuit (Pub. L. No. 97-264). However, the Claims Court has adopted the decisions of the Court of Claims as binding precedent. General Order No. 1, United States Claims Court, preceding Rule 1, Rules of the United States Claims Court, 28 U.S.C.A. (October 7, 1982). The Court of Appeals for the Federal Circuit has also adopted the decisions of the Court of Claims as precedent, subject to its power to overrule earlier holdings when sitting *en banc*. *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

covers that the value is higher may have to start the process over, regardless of any decision by the contracting officer. Moreover, the benefits of certification apply equally to claims above \$50,000 and those below that figure. If the certification requirement is modified as suggested above, the \$50,000 threshold for certification should be eliminated.

This recommendation does not address the question of when interest should begin to accrue on a contractor's claim. Congress should examine this question in connection with its consideration of this recommendation.

RECOMMENDATION

1. Congress should amend section 605(c) of the Contract Disputes Act to provide that:

(a) When the contractor believes that the exact amount of a claim cannot be determined at the time the claim is filed, the certification shall include the contractor's best estimate of the amount of the claim and an explanation of why the exact amount cannot be stated, provided, however, that the Claims Court or board of contract appeals shall set a date a reasonable time before trial on the merits of the claim for filing of a statement of the exact amount of the claim;

(b) On an express finding that justice so requires, the contracting officer, the board of contract appeals, or the Claims Court may permit certification to be made or amended at any point up to the issuance of their respective final decisions on the claim;

(c) This revised certification requirement should apply to all claims, not just those over \$50,000.

2. The certification requirement contained in section 813 of the Department of Defense Appropriation Authorization Act of 1979, Pub. L. 95-485, should either be eliminated or conformed to the requirement recommended in paragraph 1.

[48 FR 31179, July 7, 1983]

§ 305.83-2 The "Good Cause" Exemption from APA Rulemaking Requirements (Recommendation No. 83-2).

The Administrative Procedure Act (APA) provides for public participation in agency rulemaking. The Act's minimum requirements for informal rulemaking are notice and an opportunity to comment on proposed rules. The advantages of public par-

ticipation in agency rulemaking are widely recognized: the agency benefits because interested persons are encouraged to submit information the agency needs to make its decision; the public benefits for an opportunity to participate in shaping the final agency action. Congress recognized, however, that in some situations the normal public participation procedures should not be required. Consequently, the APA contains a number of exemptions, including a "good cause" exemption which allows agencies to dispense with notice and comment if those procedures are "impracticable, unnecessary, or contrary to the public interest."⁵

Experience has confirmed the need for a "good cause" exemption from the APA's notice and comment requirements. The situations in which the exemption is invoked are diverse, and it is not feasible to identify them all in advance. Some recurring examples of the types of situations requiring use of the exemption are those in which (1) advance notice of rulemaking will defeat the regulatory objective, (2) immediate action is necessary to reduce or avoid health hazards or imminent harm to persons or property, (3) immediate action is required to prevent serious dislocation in the marketplace, and (4) delay in promulgation will cause an injurious inconsistency between an agency rule and a newly enacted statute or judicial decision. A survey of court opinions in cases involving challenges to agency invocation of the good cause exemption shows that agencies generally have used the exemption with due regard to Congress' admonition that exemptions from section 553 requirements be construed narrowly.

However, experience with good cause exemption also underscores the value of public participation in rulemaking. The risk of error is heightened when an agency acts summarily, and some rules promulgated under the good cause exemption have been based on faulty or inadequate information and have produced unanticipated and undesirable effects. Public participation probably would have led to better decisions in these cases, and it might also have increased interested persons' perceptions of the fairness of the rulemaking process as well as their acceptance of the rule.

The Administrative Conference's study of the good cause exemption coincides with a reexamination of the exemption by the

⁵ 5 U.S.C. 553(b)(3)(B). The Administrative Conference has already addressed other exemptions from notice-and-comment rulemaking procedure: Recommendation 69-8 (proprietary matters); Recommendation 73-5 (military and foreign affairs functions), and Recommendation 76-5 (interpretive rules and statements of general policy).

Congress. In the 97th Congress, the Senate passed a regulatory reform bill (S. 1080) that, among other things, would have amended the good cause exemption as follows: except for rules having an insignificant impact, an agency invoking the good cause exemption would be required to comply with public participation requirements to the maximum extent feasible prior to promulgation and to fully comply after promulgation. A bill introduced in the House of Representatives in the 98th Congress (H.R. 1776) would make rules adopted under the good cause exemption interim rules that cease to be effective unless replaced by permanent rules within a prescribed period of time.

The Administrative Conference recommends that agencies provide a post-promulgation comment opportunity for rules they adopt under the good cause exemption. This opportunity should be provided whether the agency invokes the exemption on its own initiative or in response to a statutory or judicial requirement. The post-promulgation comment opportunity will give interested persons a chance to expose any errors or oversights that occurred in the formulation of the rule and to present policy arguments for changing the rule. The agency should publish a response to any relevant and significant comments, as well as its reasons for changing or not changing the rule in light of the comments. The responsive statement should be published within a reasonable time after receipt of public comments, taking into account the nature and number of comments and the agency's other responsibilities. Of course, the agency's decision to amend or repeal the rule, or its decision to deny commenters' requests for changes, will be judicially reviewable under the APA.

The Conference recommends, however, that the post-promulgation comment opportunity not extend to rules for which the agency determines public procedure to be "unnecessary," as that term has been interpreted by courts. Generally, courts have applied the "unnecessary" ground to rules that are minor or merely technical amendments in which the public has little interest; they generally have not upheld its application to rulemaking involving agency discretion on matters having a substantial impact on the public. Finally, in Paragraph 3, the Conference advises agencies to consider other measures that might appropriately be employed in particular rulemakings under the good cause exemption.

In making this recommendation, the Conference cautions agencies against more readily invoking the good cause exemption on the belief that the post-promulgation comment opportunity will be an adequate substitute for the opportunity to comment prior to adoption of a rule. Comment after promulgation is less likely to cause an

agency to reconsider the basic policy choices it made in formulating the rule. And even if the agency does reconsider the basis of the rule, it may be impossible to reverse the effects of a rule that is already in place.

RECOMMENDATION

1. Agencies adopting rules under the good cause exemption in the Administrative Procedure Act should provide interested persons an opportunity for post-promulgation comment when the agencies determine notice and comment prior to adoption is "impracticable" or "contrary to the public interest." However, a post-promulgation comment opportunity should not be required when the agency determines public procedures are "unnecessary" as that term has been interpreted by courts reviewing agency use of the good cause exemption.

2. To implement paragraph 1, agencies should:

a. Publish a notice of the post-promulgation comment opportunity in the *FEDERAL REGISTER* along with the rule and the agency's statement of reasons for its finding of good cause;

b. Give interested persons an appropriate period of time to submit comments on the rule; and

c. Within a reasonable time after close of the comment period, publish a statement in the *FEDERAL REGISTER* indicating the agency's adherence to, or plans to change, the rule and include in the statement a response to significant and relevant issues raised by the public comments.

3. In addition to the post-promulgation comment procedures specified in paragraph 2, agencies adopting rules under the good cause exemption should consider:

a. Framing the rule as narrowly as possible while still accomplishing the regulatory objective;

b. Using notice and comment procedure to develop general criteria to be applied by the agency in foreseeable, recurring situations that require emergency action;

c. Promulgating the rule as an interim rule, to be followed by an amended rule promulgated after complying with notice and comment requirements; and

d. Taking appropriate alternative steps to obtain the views of interested persons before adopting the rule.

4. If Congress amends the good cause exemption in 5 U.S.C. 553(b), it should impose requirements no more stringent than are here recommended.

[48 FR 31180, July 7, 1983]

§ 305.83-3 Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act (Recommendation No. 83-3).

This recommendation is addressed to the organizational structures which agencies establish to review decisions of presiding officers (ordinarily, administrative law judges) in proceedings governed by sections 556 and 557 of the Administrative Procedure Act or otherwise involving agency determinations on the record after opportunity for a hearing. It is based on a study of structures now in use and their relationship to the accuracy, efficiency and acceptability of the adjudicatory process.

The study concludes that variations in the characteristics and numbers of adjudicatory proceedings in different agencies and in the organization and functions of such agencies caution against recommending any single structure for review of adjudicatory decisions made by presiding officers. By and large the present review structures in the agencies studied seem well adapted to the particular circumstances of the agency. Consequently, the purpose of this recommendation is not to effect any drastic change in present structures, but to provide general guidance to agencies which are establishing new review structures or revising present ones.

In selecting among possible structures for review of adjudicatory decisions four basic precepts should be kept in mind. The first two involve considerations of efficiency; the others involve considerations of accuracy and acceptability.

First, efficiency is generally served by spreading the review load over a number of reviewers adequate to keep review time low relative to initial decision time. Application of this precept requires attention to three variables: the total relevant adjudicatory caseload, the difficulty of the cases, and the number of reviewers.

Second, efficiency also is served by minimizing repetition; the same matter seldom should be put in issue more than once. This cautions against *de novo* review, instead favoring more limited review of issues properly committed to a subordinate.

Third, accuracy depends on matching the skills of the reviewer to the issues presented. Officials integrated into the agency's

polymaking apparatus should review decisions that significantly involve policy issues while officials trained in factfinding should review decisions presenting fact issues. Furthermore, the level of the reviewer should match the magnitude of the issue. Agency heads with numerous other responsibilities should be insulated from routine cases, but attempts to force resolution of major policy issues at lower levels seem misguided except when those issues can readily be addressed by rulemaking. Similarly, individual reviewers easily can address relatively simple issues, whether of fact or of policy, while more complex questions may call for collegial consideration.

Fourth, acceptability generally requires that some review by a higher agency authority be available at the instance of the aggrieved party, at least in cases of great impact on individual parties. Inspection of a substantial penalty and removal of a valuable government benefit are obvious candidates for review as of right.

RECOMMENDATION

1. Agency Head Review

a. In drafting legislation governing the institutional structure for agency adjudicatory proceedings, Congress should favor delegation of decisional authority and should not prescribe detailed review structures. The presumption should be that each agency head is best able to allocate review functions within the agency.

b. Congress should authorize agency heads¹—

(i) to review initial decisions of presiding officers in adjudicatory matters on a discretionary basis, as described in Administrative Conference Recommendation 68-6, section 2(b); and

(ii) to delegate review authority on an *ad hoc* basis or with respect to any or all classes of decisions to a subordinate official or board of officials either with possibility for further review by the agency head in his discretion or without further administrative review.

¹ "Agency head" is used in the functional sense of the individual or body politically responsible for the administration of the program in question whether this responsibility is vested by statute or by delegation from a superior official, such as the Secretary of a department.

Where the agency head retains the right of discretionary review of an initial or intermediate decision, the agency should provide by regulation the grounds and procedures for invoking such review, in accordance with the guidelines set forth in section 2(b) of this Recommendation.

c. Only in the rarest circumstances should Congress require agency heads to review decisions personally. These circumstances are where:

(i) In the case of an agency headed by an individual, the subject matter at issue is of such importance that attention at the very highest level is imperative; or

(ii) In the case of an agency headed by a collegial body, the subject matter at issue is of special importance, the cases comprising the relevant class of decisions are few in number, and the agency either has no other significant non-adjudicatory functions or has few such functions and has a sufficient number of members adequately to perform review and other tasks. This paragraph does not address requirements for discretionary review procedure under which a case may be brought before the agency for review on the vote of one or more members of the agency.

Nothing in this section is intended to deal with the appropriate allocation of responsibilities between the agency head and his subordinates in connection with the decisions in cases which he personally reviews.

2. Forms of Delegations

a. *General.* Agency heads having powers of delegation should delegate review authority on a class, rather than case-by-case, basis whenever a substantial number of cases is adjudicated at the agency. Delegations on an *ad hoc* basis should be limited to situations where adjudicatory proceedings are relatively few and of such varied nature as to make selection of a single qualified reviewing authority difficult.

b. *Reservation of Authority.* Where an agency head delegates review authority, any authority he retains to grant further review should normally be exercisable only in his discretion on a showing that important policy issues are presented or that the delegate er-

roneously interpreted agency policy. Multilevel review of purely factual issues should be avoided.

3. Choice of Delegate

When an agency head determines to make a standing delegation of his review authority, either unconditional or subject to further discretionary review, he may choose between delegating to a subordinate authorized to act individually, e.g., a judicial officer, or to an employee board authorized to act collegially. A multi-member agency might also delegate to one of its members or a panel made up of its members. In choosing the form of reviewing authority, the agency head should consider the function to be performed by the authority and the degree of finality expected of its decisions. This section sets forth some factors which may guide an agency head in his choice among these forms. The list is not intended to be exclusive, nor to suggest that in every case there are clear grounds for preferring one form to another.

a. *Individual Delegates.* Where a standing delegation of review authority is to be adopted, the following factors favor a delegation to an individual delegate (or to a number of delegates authorized to review decisions individually) rather than to several delegates acting jointly: the number of cases is large, the cases are relatively simple, and the predominant issues concern descriptive facts, or, to the extent complex issues are presented, their resolution generally depends on application of a single skill or discipline, such as legal interpretation, or application of knowledge uniquely associated with the medical or engineering professions or with a discrete branch of science rather than on some combination of skills or disciplines.

b. *Review Boards.* In deciding whether a delegation instead should be made to a group of persons jointly charged with review of ALJ decisions, among the factors that should be considered as favoring such delegation are: the caseload is substantial (but somewhat less than that contemplated by paragraph (a) above), and includes more complex cases that consume a

significant amount of time at the initial decision stage, and cases presenting a class of issues dependent for resolution on the application of several different skills or disciplines.

c. *Agency Panels.* In some circumstances, a multi-member agency may find it desirable to make a standing delegation of review authority to a panel of agency members. Factors favoring such delegation include a large adjudicatory caseload and difficulty in elaborating or clarifying agency policy (especially through formal mechanisms such as rulemaking) in a manner that will substantially limit the number of significance of policy issues presented in adjudications.

4. Standards for Grant of Review

a. *Review of Right; Discretionary Review.* Delegation of review authority does not necessarily imply that such review must be available as of right. While review of right is appropriate in certain cases because of the severe consequences to the parties, such as cases involving the imposition of a substantial penalty or the revocation of a license, agency heads should consider the desirability in routine cases of authorizing the review authority to decline review in the absence of a reasonable showing that:

(i) A prejudicial procedural error was committed in the conduct of the proceeding, or

(ii) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which should be reviewed.

b. *Review Sua Sponte.* Normally, a reviewing authority should call up a case for review *sua sponte* only where policy issues are involved and the functions of that authority include the resolution of such issues.

[48 FR 57461, Dec. 30, 1983]

§ 305.83-4 The Use of the Freedom of Information Act for Discovery Purposes (Recommendation No. 83-4).

The Freedom of Information Act (FOIA) and discovery provide separate mechanisms for obtaining the disclosure of Government documents. Any person may invoke at any time the release provisions of the FOIA by requesting an agency to disclose any reasonably described agency records. A requester's need for the records and his purpose in making the request normally do not affect the right to obtain disclosure. The agency must release the records unless they fall within one of the nine exemptions specified in the Act. On the other hand, a person may obtain the disclosure of Government documents through discovery only if he is a party to a judicial or administrative proceeding and if the procedural rules governing the proceeding include provisions for discovery. If both these conditions are satisfied, the party may normally obtain from the Government through discovery unprivileged documents relevant to the subject matter of the pending proceeding.

The separate disclosure mechanisms established by the FOIA and by discovery serve different purposes. Congress' fundamental objective in enacting the FOIA was to permit the public to inform itself about the operations of the Government. All members of the public are beneficiaries of the Act because Congress' goal was a better informed citizenry. A requester's rights under the Act are therefore neither diminished nor enhanced by his status as a party to litigation or by his litigation-generated need for the requested records. Discovery, on the other hand, serves as a device for narrowing and clarifying the issues to be resolved in litigation and for ascertaining the facts, or information as to the existence or whereabouts of facts, relevant to those issues. In the discovery context, a party's litigation-generated need for documents does affect the access available to him and may result in the disclosure to him of documents not available to the public at large.

Discovery does in fact provide parties to litigation with the more reliable mechanism for obtaining from the Government the information which they need to prepare for trial or hearing. Parties to litigation nevertheless sometimes use the FOIA for discovery purposes because they hope to obtain the release of additional agency records for use in litigation, or to obtain the release of records at an earlier time. Limitations on the availability of discovery explain these uses of the FOIA. Discovery is a pretrial procedure designed to permit the parties to a proceeding to prepare for trial or, if possible, to resolve the controversy without a trial. It is not designed to provide the par-

ties with the level of access to Government documents furnished to the general public by the FOIA; and even the most generous rules of discovery do not always provide the parties with that level of access.

There are several limitations on the Government's disclosure obligations in the discovery context that account for use of the FOIA as a supplemental discovery device. First, discovery is normally available to the parties only after a proceeding has begun and then only for a short period of time before trial or hearing. Second, it may be used only to obtain documents that are relevant, or that may lead to information that is relevant, to the pending action. Recent reform efforts have sought to keep civil discovery in the federal courts within reasonable bounds by emphasizing that the purpose of discovery is not the disclosure of information but the simplification of the matters in dispute. More specifically, the 1980 and 1983 amendments to the discovery rules in the Federal Rules of Civil Procedure seek to prevent "overdiscovery" by increasing the trial judge's supervisory role. Less generous discovery is available in criminal proceedings than in civil actions; and, in some administrative adjudications, no formal discovery is available at all.

The Conference believes that the use of the FOIA for discovery purposes is a matter of valid concern to the Government because that use, unlike other uses of the FOIA, may disadvantage the Government's position in litigation in several ways. First, a party in litigation with the Government may obtain the release of agency records without the knowledge of Government counsel and then seek to use those records to surprise Government counsel at trial or hearing. Second, a party in litigation with the Government may disrupt the Government counsel's trial preparation by seeking, perhaps on the eve of the trial or hearing, the release under the FOIA of records in the Government's litigation files. In these cases, the Government counsel must divert attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records. Under the FOIA, unlike in discovery, the Government does not enjoy the protection of a cut-off date after which no further requests can be made. Third, a party in litigation with the Government may request production of the same documents under the FOIA and in discovery, thus necessitating duplicative searches and releases. In these cases, the Government's primary concern is not the extra burden imposed on the agency's public information office in processing the party's FOIA request, but the burden imposed on counsel representing the Government to protect himself from duplicative effort and to keep himself informed of the

Government documents obtained by opposing parties.

Some recent proposals to amend the FOIA address the problem by temporarily denying the use of the FOIA to a party to a pending administrative or judicial proceeding where the agency records in question may be requested from the Government through discovery.¹ The Conference declines to take a position on these proposals, but prefers to endorse a relatively modest change in the law because the evidence is inconclusive that a substantial burden to the Government is caused by use of the FOIA for discovery purposes and because the proposals raise significant concerns of coverage (i.e., applicability to proceedings where discovery is limited) and enforceability.

If the FOIA does remain fully available to a party in civil litigation with the Government, the potential disadvantages to the Government will be at least partially alleviated by requiring the party to notify Government counsel of all FOIA requests made by or on behalf of the party for the purpose of obtaining information for use in that litigation. Through notice of these FOIA requests, Government counsel will be able to learn what records the agency is releasing in response to the requests. This should eliminate any danger of surprise at trial or hearing. Also, a simple inquiry to the other side or to the agency FOIA office at the inception of discovery can determine whether the party made any prior FOIA requests that relate to the litigation. Advance notice of a party's FOIA requests may also permit Government counsel to coordinate FOIA and discovery searches for the same records and to avoid duplicative searches. Counsel will therefore be in a stronger position to protect his litigation files, although he may still need to divert his attention from trial preparation in order to assist the agency's public information office in resisting the disclosure of exempt records.

Finally, courts have recognized that the FOIA should not be used to delay judicial or administrative proceedings.² The Conference believes that parties to litigation should not be able to use the FOIA to delay ongoing litigation in any fashion. Congress, or the courts and the administrative agencies through exercise of their rulemaking or decisional powers, may properly provide that pendency of a FOIA request, or of proceedings related to such a request, should not affect the progress of litigation to which

¹ See, e.g., S. 774, 98th Cong., 1st Sess. (1983).

² See, e.g., the "DeLorean case," *United States v. United States District Court, Central District of California*, 717 F. 2d 478 (9th Cir. 1983).

the requested information may arguably pertain.

RECOMMENDATIONS

1. Congress should amend the Freedom of Information Act (FOIA) to require a party to a judicial action or to an administrative adjudication or formal rulemaking proceeding, to which the Government is also a party, to notify counsel for the Government promptly of any FOIA requests made by the party, by his counsel, or by some other person acting on the party's behalf, during the pendency of the proceeding for the purpose of securing the release of agency records that may be relevant to the proceeding.

2. Congress should also provide that, if a party does not comply with this notice requirement, the court or agency conducting the proceeding may preclude the party from offering in the proceeding any agency records released in response to the request.

[48 FR 57463, Dec. 30, 1983]

§ 305.84-1 Public Regulation of Siting of Industrial Development Projects (Recommendation No. 84-1).

Major industrial development projects often have significant environmental effects and require permit approvals and preparation of environmental reviews by agencies under legislation such as the National Environmental Policy Act (NEPA) and the Clean Air Act. Although governmental permitting and review processes—aimed at protecting the environment, reducing safety risks, and assisting the planning of livable communities—necessarily extend the time required to complete projects, unnecessary delays associated with the complexity of lengthy processes can have serious negative consequences. Project costs can rise dramatically over initial estimates, resulting in increased costs to consumers for the products or services eventually delivered. Project approval delays have led to pressure to circumvent environmental laws by means of special legislation for particular projects or types of projects. The consuming public can further suffer from process delay by being deprived for substantial periods of time—and, in cases of project abandonment caused by delay, forever—of the benefits of emerging new technology. The Administrative Con-

ference¹ believes that, when many agencies at different levels of government must approve a project proposal, the complexity and uncertainty of the process can be reduced through an appropriate degree of interagency coordination and the use of adequate procedures.

Interagency Coordination

Many Federal, state, and local agencies must review environmentally sensitive industrial projects. Project developers need assistance in determining which agencies must be consulted for project approval, what permits are required, what applications must be completed, and what information is need for each application. Developers' informational needs could be met by a clearinghouse established at the level of government closest to initial project review.

When relatively few agencies must consider a project application, agreements can be worked out among the agencies to coordinate agency review or to resolve jurisdictional or interpretative conflicts. These agreements can facilitate more timely project review, reduce overlapping review, decrease uncertainty, and provide for joint state-federal agency review of a project.

When many agencies with different responsibilities, distinct agency missions, and different governing statutes must approve a project proposal there is a strong need for coordination. Selection of a coordinating agency early in the application process is desirable to facilitate the permitting proc-

¹ Congress requested that the Administrative Conference (ACUS) work cooperatively with the Advisory Commission on Intergovernmental Relations (ACIR) toward resolving regulatory conflicts and overlap among federal, state, and local agencies. ACUS and ACIR were specifically asked to address the issue of streamlining the permit process based on approaches that lead to improved intergovernmental cooperation. Congress was concerned with the complexity and costs associated with the permit process in the review of energy and port development projects. Congress expects ACIR and ACUS to work together to assess alternative ways to resolve intergovernmental problems and conflicts in permitting. In conducting this joint effort, the agencies have sought and will continue to seek the input of business, government, and environmental experts. House Committee on Appropriations, Report on Treasury, Postal Service, and General Government Appropriation Bill, 1983, H.R. Doc. No. 854, 97th Cong., 2nd Sess. 39 (1982). ACIR has cooperated in the development of this recommendation, but has not formally adopted the recommendation at this time.

ess. The coordinating agency can facilitate the exchange of information, can encourage more efficient review, and can reduce the mistrust by scheduling regular face-to-face meetings among the project developer, governmental agencies, interest groups, and residents of the community in which a project is to be located. The coordinating agency often will have permitting duties but may be a non-permitting body such as the Colorado Joint Review Process.³ To be effective a non-permitting body must be supported by key government leaders in the jurisdiction. The coordinating agency may be a body different from the clearinghouse agency or the lead agency for environmental review preparation.

Public Participation

Citizens of the community in which a project is to be sited have a strong interest in the project and will seek information about the project particularly when it has major environmental effects. Environmental groups and other members of the public also have similar interests. Severely limiting legitimate public participation can unnecessarily increase opposition to a project and can lead to lawsuits to stop a project. Facilitating public participation can reduce fears and concerns, can mitigate the not-in-my-backyard attitude of a community, and can lessen public mistrust of the developer and government. The public can also contribute useful information to a project. Developers can allay concerns by sharing information about their project with the public and can work more effectively by cooperating with the community in which a project is to be sited. Public participation at an early stage of agency review ensures that changes can be made before substantial developer funds

³The Colorado Joint Review Process (JRP) is an innovative new approach to coordinating governmental review of energy projects. Originally part of the Colorado Department of Natural Resources, it is now a wholly separate body, fully supported by the Governor and other key state officials. The JRP has no permitting responsibilities but performs a coordinating role and operates on a voluntary basis. A developer must choose to have its project application accepted into the JRP. The JRP works with the developer, the public, and all levels of government to identify affected agencies and permit processes, to determine what environmental and other issues must be addressed, to clarify what information is necessary, and to establish a decision schedule for all governmental review processes that must be completed for that project. The JRP sponsors periodic meetings with all affected actors and otherwise seeks to ensure a smoother and more organized review.

are committed to a specific project design. Public participation can be enhanced when meetings or hearings are held in the project community and when the agency designates a public advisor to help citizens understand the process.

Environmental Review

Under the provisions of NEPA and similar state legislation, environmental reviews often must be prepared by agencies prior to approving a project application. When both Federal and state environmental review statutes apply to a project application, preparing a joint review can reduce duplication and overlap. The approach taken in the regulations of the Council on Environmental Quality—in which a "lead agency" is designated to coordinate the preparation of an environmental impact statement—provides an excellent model adaptable even when there is no major Federal interest in a project. Early identification of environmental impacts through the "scoping of issues" process facilitates statutory compliance and allows project changes by a developer when they are least expensive. Identifying commenting agencies early in the process ensures that the concerns of every agency are addressed in the review. Face-to-face meetings of all participants in the review process are useful for identifying impacts, exchanging information, and getting to know the other participants in the process and their concerns. The lead agency can ensure a more timely review process by negotiating a decision schedule—in which a completion date for each step of the process is agreed upon—with the project proponent, other agencies, and representatives of other identified interested groups. The lead agency can play a major coordinating role by identifying other agencies, setting up meetings, organizing the stages of review preparation, and negotiating decision schedules for each stage.

Permit Approvals

Developers must file applications in which they provide information about their project. Developers and agencies may disagree as to what information is required and how much information is adequate for a complete application. There may also be uncertainty over procedural and substantive requirements that must be met. Agencies can assist developers by specifying in advance the information needed for an application to be complete and the standards that must be met for a permit to be approved. The agency can clarify what is required by holding pre-application meetings with developers. The agency can resolve informational, procedural, and substantive problems by holding post-application meet-

ings with the developer. Agencies need adequate information and full cooperation from developers to make permitting or compliance decisions. Duplication, overlap, and paperwork can be reduced if agencies with joint permit responsibilities for a project adopt common application requirements, standardized information requirements, and common procedures such as joint hearings. Sharing of staff and budgetary resources can make these approaches easier to implement.

Time Limits for Decisionmaking

Legitimate concerns are expressed by developers and others that too much time is required by agencies to review and permit major industrial projects. Legislatures have reacted by passing time limit statutes that mandate an agency's preparation of an environmental review or action on a permit application within a set period of time.³ When setting a time limit by statute, a legislature must be sensitive to the agency's needs by allowing in the statute sufficient time to complete the decision—including time that may be required for action by other agencies that have concurrent review responsibilities, by giving the agency adequate resources, and by allowing the agency flexibility to extend the deadline for good cause. Agencies often have the most knowledge about how long a particular type of decision can take, and agencies can specify by regulation an appropriate time limit. Agency compliance with time limit statutes can be monitored if the legislature requires agencies periodically to report their performance under the statute and to identify any problems encountered in meeting the time limits.

An alternative to mandated statutory time limits is a requirement that agencies establish decision schedules which set deadlines for the completion of specific actions (e.g., comment periods, drafting of required agency reports) within each phase of project review. A decision schedule is desirable because it is individualized for each project and because it requires the developer and all responsible agencies to make commitments to meet the agreed schedule.

³In Recommendation 78-3 the Conference stated: "Congress ordinarily should not impose statutory time limits on an agency's adjudicatory proceedings. Statutory time limits may be appropriate, however, when the beneficial effect of agency adjudication is directly related to its timeliness, as may be true in certain licensing cases or in clearance of proposed private activity where a delayed decision would deprive both the applicant and the public at large of substantial benefit." 1 CFR 305.78-3, para. 3. These concerns for timeliness are particularly pertinent here.

Commitment by the developer is crucial since developers can speed up or slow down development of a project depending upon internal or external economic considerations. Also some agencies may not be sufficiently committed to timeliness; if agencies are required to agree to a schedule, they are more likely to make that commitment.

RECOMMENDATION

These recommendations are directed primarily to Federal, state, regional, and local agencies that have permitting and environmental review responsibilities. In addition, many of the time limit recommendations are directed to Congress and state legislatures. To the extent statutory changes are necessary to implement the other recommendations, they are also directed to the appropriate legislative bodies.⁴

A. INTERAGENCY COORDINATION

1. Clearinghouses should be established at the level of government closest to initial review of a particular project to provide information to project developers about applications, agencies to be consulted, and permitting requirements.

2. Agencies should make agreements to coordinate review of a particular project, or to resolve jurisdictional or interpretive conflicts.

3. A coordinating agency should be selected to coordinate governmental review of projects when many agencies are involved. The coordinating agency may be either a permitting or a non-permitting agency.

4. The coordinating agency should schedule regular face-to-face meetings among developers, agencies, and the public.

5. The Colorado Joint Review Process approach (note 2, *supra*) in which a non-permitting agency coordinates project review by all agencies is one possibility that should be considered.

B. PUBLIC PARTICIPATION⁵

1. In order to facilitate approval processes, agencies with permitting

⁴See statement regarding joint ACUS-A CIR effort in note 1.

⁵This part does not overrule or supersede Recommendation 71-6: Public Participation

Continued

and environmental review responsibilities should solicit and consider the views of public participants, including citizens of the community in which a project is to be sited.

2. To make public participation more meaningful, agencies should develop procedures such as holding local meetings or hearings and designating public advisors who can provide assistance on procedural aspects of agency proceedings to participants.

3. Agencies should encourage developers to provide information to the community about a project application and to be responsive to legitimate community concerns.

4. Agencies should ensure that public participation occurs at an early stage of project review and developer planning so that changes in project design can be made before substantial funds are committed to a specific project design.

C. ENVIRONMENTAL REVIEW

1. When several agencies are involved in environmental review preparation for a single project, a lead agency (Federal, state, regional, or local, as appropriate) should be designated to coordinate the activities. The approach taken in the regulations of the Council on Environmental Quality (40 CFR Parts 1500-1508) is recommended, even when a formal environmental impact statement is not required.*

2. The lead agency should identify commenting agencies and should schedule face-to-face meetings of all participants in the review process.

3. The lead agency should utilize the scoping of issues process to identify environmental impacts early in the review process before a draft review is prepared.

4. The lead agency should negotiate decision schedules—setting deadlines for completion of scoping, draft review

preparation and comments, final review preparation and comments, and issuance of a review—with the developers, all affected agencies, and representatives of other identified interested groups.

5. When appropriate, agencies should agree to prepare joint state-federal environmental reviews.

D. PERMIT APPROVALS

1. Whenever feasible permitting agencies should specify in advance what informational, procedural, and substantive requirements will apply to a particular permit application.

2. Agencies should be available for pre-application meetings with the project developer to clarify informational, procedural, and substantive requirements.

3. Within a short period of time after the filing of an application, agencies should determine whether the application is complete. Agencies should hold post-application meetings with developers to discuss procedural, informational, and substantive deficiencies in an application, and should promptly advise developers of any deficiencies throughout the pendency of the permitting process.

4. Agencies should make clear to developers that the developers must supply necessary information in an application and that their cooperation will greatly assist in the permitting process.

5. Whenever feasible, agencies with joint permitting responsibility for a project should be encouraged to reduce duplication and paperwork by accepting common applications, by standardizing informational requirements, by using in one agency proceeding relevant information developed in the proceeding of another agency, and by adopting common procedures such as joint hearings.

E. TIME LIMITS FOR DECISIONMAKING⁷

1. Agencies should negotiate a decision schedule with the project devel-

^{*}In Administrative Proceedings (1 CFR 305.71-6).

^{*}The Conference is not suggesting that an environmental impact statement be prepared when none is required by law, but only that, if environmental review is to involve several agencies, a lead agency be selected.

⁷See generally, Recommendation 78-3: Time Limits on Agency Action (1 CFR 305.78-3), which is consistent with this part.

oper, all affected agencies, and representatives of other identified interested groups within existing statutory deadlines. The schedule should set a deadline for the completion of specific stages of project review. The schedule should be contained in an agreement in which the developer and the agencies make a commitment to meet the deadlines.

2. If a legislature^{*} wishes to limit the time available for a proceeding, it is preferable that the statute require the agency to fix the time limit by rule, rather than to specify the time limit in the statute itself.

3. A legislatively mandated time limit should allow an appropriate amount of time for the type of decision involved, should specify the consequences of not meeting the time limit, and should provide the agency with the option of extending the time limit for good cause explicitly stated.

4. Legislatures should provide adequate resources for agencies to meet time limit requirements and should periodically review agency compliance with time limits.

[49 FR 29938, July 25, 1984]

§ 305.84-2 Procedures for Product Recalls
(Recommendation No. 84-2).

Each year manufacturers recall millions of consumer products—ranging from toys and household appliances to drugs and autos—under an array of Federal health and safety statutes. Most recalls are undertaken voluntarily, either on the manufacturer's own initiative or at the urging of a Federal agency with recall authority. The recall remedy, while a valuable enforcement tool, is also one that is difficult to implement. A recall must be undertaken promptly if it is to serve its purpose of preventing injury. Further, to be effective, it must be implemented in a way that encourages public responsiveness.

For purposes of this recommendation, the term "recall" encompasses a variety of post-sale remedial actions by manufacturers and sellers of products, including: (1) Notifying consumers of problems or potential problems with products; (2) offering to repair products; and (3) offering to refund the cost or to replace products. The recommendation is based, in part, on a study of the recall

programs of three Federal agencies that account for the great majority of recalls—the National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC).¹ Each of the three agencies studied has the authority to order at least one of the post-sale remedial actions noted above. Each is actively involved in recalls of consumer products that pose health or safety risks to the general public, instances where the need for effective use of the recall remedy is the greatest and its implementation is the most difficult. However, these recall programs differ with respect to standards for ordering recalls, the scope of the remedy, and administrative procedures. Some of the differences are statutorily based; others grow out of varied methods of implementing the programs.

Although all three agencies make extensive use of recalls to implement their statutes, recalls have certain inherent limitations as enforcement tools. Consumers can, and sometimes do, render them ineffective by failing to respond. Further, recalls generally work well only if they are undertaken promptly and after a minimum of agency prodding. Recalcitrant firms can often thwart the effectiveness of the remedy merely by invoking available administrative procedures. There are a number of reasons for firms to be recalcitrant when faced with a possible recall. Companies may not enjoy much protection against product liability claims by recalling defective products—indeed, recalls can stimulate additional law suits. Recalls often bring adverse publicity, and they can be very expensive, requiring refunds or replacements of products that have already been produced and marketed.

Because recalls often work better than other remedies, however, they are a major enforcement tool of the three agencies studied. There are a number of reasons for their popularity. From the agencies' standpoint:

—Recalls do promote safety. Although response rates are lower than agencies would like, consumers in significant numbers do return or discard recalled products or use them more safely.

—Recalls establish precedents for what constitutes an unacceptably hazardous product.

—Recalls operate more quickly and efficiently than most standard setting. In recall cases, government and industry often share a sense of urgency that a hazardous product should be removed from the marketplace. This has led agencies to adopt informal, flexible settlement procedures which have

^{*}As used here, "legislature" includes Congress, as well as state, regional, and local legislative bodies.

¹Other agencies that engage in product recalls include EPA, FAA, HUD and USDA.

made it easier for companies to agree to undertake recalls.

Industry also may prefer recalls to standards as an enforcement tool because recalls generally affect only the makers of unsafe products rather than all product manufacturers. Recalls, unlike many standards, do not impose across-the-board certification requirements and may impose fewer record-keeping requirements.

Agencies must reconcile several interests in implementing their recall programs. They must be sensitive to the potential for consumers to disregard recalls if the remedy is overused. They must stress voluntary agreements to achieve prompt—and therefore effective—recalls, yet be willing to use their enforcement powers if voluntary efforts stall. They must be flexible in negotiating the terms of recalls to encourage voluntarism, yet assure that the notice and remedy are adequate to inform and protect product owners.

In general, agencies should work together to develop a more uniform approach to recalls. Despite the differences in the agencies' programs, they share common characteristics and goals, and they must all deal with the general public. Agencies could benefit from sharing with each other what they have learned about recalls, and the public could benefit from more consistency in the recall programs.

Agencies should also consider publicly classifying their recalls according to risk to help the public assess the hazards of recalled products. While this approach may present some problems in negotiating recalls, it recognizes the important role that the consumer plays as a partner with government and business in the recall process and the need to provide that partner with adequate information.

Moreover, additional enforcement tools are warranted for some agencies. As a practical matter, agencies cannot bring many enforcement actions, but the availability of these additional powers, and their occasional use when necessary, can assist agencies in negotiating voluntary recalls and in carrying out the overall aims of the recall programs. Even a relatively small number of enforcement actions ultimately serves the broader aim of encouraging voluntary compliance by others, and should therefore be streamlined where possible.

Three procedural reforms are recommended for the consideration of agencies with recall programs. First, such agencies should consider seeking broader statutory authority to require manufacturers to report safety defects. A provision similar to section 15(b) of the Consumer Product Safety Act, which requires reporting of defects that "could create" a potential hazard, would give agencies earlier warning of defects and

reduce their information gathering burden, without changing the standard for recalls.

The second recommended change would give agencies additional authority in cases involving serious or imminent safety problems. In general, if a case must be taken through both administrative and judicial proceedings, the process may be so lengthy that the recall could be ineffective, since most of the injuries will have occurred and the response rate will be low. Therefore, agencies should consider asking for authority in especially hazardous cases to bypass the administrative hearing and to seek court-ordered recalls.

The third general reform is based on the premise that the availability of a variety of enforcement tools, such as court-ordered seizures and civil penalties, helps to induce voluntary cooperation with an agency's recall program. Seizure is not always an effective tool, however, unless the agency is able to detain products administratively at the point of distribution prior to filing a seizure action. CPSC and FDA, which have authority to seek court-ordered seizures, should consider the desirability of detention authority where it would aid their use of this enforcement tool. FDA should also consider seeking civil penalty authority for statutory violations where it now only may seek criminal penalties.

Paragraph B.4 of the recommendation is addressed specifically to the CPSC. The CPSC enforces four significant safety statutes: the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), the Flammable Fabrics Act (FFA), and the Poison Prevention Packaging Act (PPPA). Both the CPSA and the FHSA give the agency the authority to order recalls, and this has become a favored enforcement tool of the agency. Under these two Acts, if a voluntary recall is not achieved, the agency must conduct a formal administrative hearing prior to ordering a recall. Under the CPSA, the agency may go directly to court to seek a recall if the product involved is "imminently hazardous." Under the FHSA, the agency may proceed administratively against imminently hazardous products. Neither Act contains a judicial review provision, with the result that "non-statutory" review of agency recall orders occurs in the United States District Courts. The absence of a judicial review provision for recall orders under the CPSA and FHSA should be corrected. Congress should provide for judicial review in the United States Courts of Appeals under 5 U.S.C. § 706.³

³See ACUS Recommendation 75-3, The Choice of Forum for Judicial Review of Administrative Action, 1 CFR 305.75-3.

This would eliminate the existing, lengthy, two-tiered judicial review procedure. The FFA and PPPA omit recall provisions entirely, causing uncertainty as to the Commission's ability to use recalls against unsafe products governed by either of these Acts. It would promote recall uniformity and reduce delay if the Commission could address the risks posed by all products under its jurisdiction under the procedures of section 15 of the CPSA.

RECOMMENDATIONS

A. COORDINATION OF RECALL ACTIVITIES

1. *Interagency recall liaison group.* A group consisting of representatives from all agencies with recall programs should be established to inform each other about their programs and to share research in areas of common interest, such as how to improve consumer response rates and how to use new technology to improve recall notification.

2. *Recall notices.* Recall notices should clearly describe the nature of the defect and the nature and extent of the risk of harm that prompts the recall. Individual agencies should consider whether their mission would be advanced by classifying recalls according to risk. The interagency liaison group could explore the possibility of coordinating the classification systems so that the agencies use similar terminology to designate levels of risk.

3. *Improved handling of consumer inquiries and complaints.* Consumers do not always know which agency takes complaints or has information about recalls. Agencies with recall programs should establish a central interagency switchboard to take all calls and refer them to the appropriate agency. As an alternative, agency personnel designated to receive inquiries or complaints relating to product defects should be made aware of the recall programs of other agencies, so that inquiries, or complaints will be referred to the proper office.

4. *Publicizing recalls.* Each agency should seek to develop a method of publishing periodically an up-to-date list of active recalls within the agency's jurisdiction.

B. PROCEDURAL IMPROVEMENTS

1. Agencies with recall programs should consider whether to ask Congress for authority to require manufacturers to give such agencies information in their possession about potential safety-related defects in their products which could create a substantial risk of injury to the public. Such authority, if granted, should be accompanied by appropriate incentives for compliance.

2. Agencies with recall programs for defective products should consider whether to ask Congress for authority to bypass administrative hearings and to seek court-ordered recalls in cases of serious safety problems as defined by the relevant statute.

3. Agencies authorized to seek seizures should consider whether to ask Congress to augment their seizure authority by giving them the power to detain defective products administratively prior to seizure.

4. Congress should streamline the Consumer Product Safety Commission's recall authority by amending the Consumer Product Safety Act (a) to give the Commission specific authority under that Act to seek recalls of all products within its jurisdiction, including those now subject to the Federal Hazardous Substances Act, the Flammable Fabrics Act and the Poison Prevention Packaging Act; and (b) to provide for judicial review of agency ordered recalls in the United States Court of Appeals under 5 U.S.C. 706.

5. The Food and Drug Administration should consider whether to ask Congress for civil money penalty authority as an option where only criminal penalties are now available.³

6. The foregoing recommendations are not intended to encourage agencies to use recalls as a substitute for rule-making, but merely to streamline the process of obtaining recalls where appropriate.

[49 FR 29940, July 25, 1984]

³See ACUS Recommendation 72-6, Civil Money Penalties as a Sanction, 1 CFR 305.72-6.

§ 305.84-3 Improvements in the Administration of the Government in the Sunshine Act (Recommendation No. 84-3).

A. Periodic Agency Review of Sunshine Practices. Members of the public voice several criticisms of the manner in which agencies employ the Government in the Sunshine Act and conduct open meetings. Among the most significant are that meetings are often closed on technical legal grounds without substantive reason for doing so, that at times discussion in meetings is inadequate to allow those in attendance to understand fully the proceedings, and that frequently members of the public have insufficient access to explanatory materials and underlying documents to allow them to follow the discussion and comprehend the content of meetings. At issue is not so much compliance with the letter of the law as progress toward fuller realization of its general objective of enlarged, meaningful public access to information. To the extent that problems exist, they are a function of agency practice and are appropriately addressed in their particulars on an agency-by-agency basis.

B. Impact of Sunshine on the Collegiality of Agency Decisionmaking. The desirability of the collegial form of agency organization, as opposed to the agency headed by a single executive, has long been the subject of debate. Congress has, however, chosen to delegate certain administrative functions to collegial bodies.

One of the most frequently offered justifications for collegial decisionmaking is that stated by the First Hoover Commission's Committee on Independent Regulatory Commissions:

A distinctive attribute of commission action is that it requires concurrence by a majority of members of equal standing after full discussion and deliberation. At its best, each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a source of decisions based on different points of view and experience The member of the commission must expose his reasons and judgments to the critical scrutiny of his fellow members and must persuade them to his point of view. He must analyze and understand the views of his colleagues if only to refute them.

Though no generally accepted standard for measuring the quality of agency decisions under the Government in the Sunshine Act has been devised, one of the clearest and most significant results of the Government in the Sunshine Act is to diminish the collegial character of the agency decisionmaking process. The open meeting requirement has generated reluctance to dis-

cuss certain important matters; and discussions, when they occur, may not contribute to achieving a consensus position. In some agencies the pattern of decisionmaking has shifted from collegial exchanges to one-on-one encounters, transmission of views through staff, and exchanges of memoranda or notation procedure. The inhibition of collegial exchanges, in turn, impedes the members in the collective exercise of their responsibilities, and tends to weaken the role of the collegium vis-a-vis that of the staff and the agency chairman.

Congress was aware of the inherent and unavoidable tension between the values of openness in government and collegiality in decision making when it enacted the Government in the Sunshine Act, and it consciously chose a result that would maximize openness. Concessions were made in the statute to the need for maintaining the confidentiality of certain categories of information under discussion, but few if any concessions were made to the needs of the deliberative process as such. Although the legislative history indicates Congress believed that, after the initial period of adjustment, sunshine would not have a significant inhibiting effect on collegial exchanges, unfortunately this has not been the case.

RECOMMENDATION

1. Agencies should continually strive to reflect fully in their activities the basic purpose of the Government in the Sunshine Act, which is to enlarge public access to information about the operations of government. Agencies are strongly encouraged to review periodically their sunshine policies and practices in light of experience and the spirit of the law for the purpose of making adjustments that would enlarge public access to meaningful information, such as (a) invoking the exemptions of the Act to close meetings only when there is substantial reason to do so; and (b) making open meetings more useful through comprehensible discussion of agenda items and provision of background material and documentation pertaining to the issues under consideration.

2. Under the Government in the Sunshine Act the degree of collegiality in the multi-member agencies has diminished. Congress should consider whether the present restrictions on closing agency meetings are advisable and, if not, how they might best be revised without undercutting the basic principle of the Act that "the public is

entitled to the fullest practicable information regarding the decision making processes of the Federal Government."

If a new balance is to be struck between the values of collegiality and openness, the Administrative Conference suggests that agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities (including enforcement priorities) in closed meetings, when the discussions are preliminary in nature or pertain to matters, such as budget or legislative proposals, which are to be considered in a public forum prior to final action.

[49 FR 29942, July 25, 1984]

§ 305.84-4 Negotiated Cleanup of Hazardous Waste Sites Under CERCLA (Recommendation No. 84-4).

By enacting the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) in 1980, Congress undertook to provide a Federal solution for the problem of abandoned and inactive hazardous waste disposal sites. Approximately 2,000 sites will require action, at a cost of tens of billions of dollars. CERCLA created a \$1.6 billion revolving "Superfund" for direct Federal action to clean up these sites and respond to hazardous waste emergencies. The Act supplements this public works authority with provisions for negotiating cleanups by "potentially responsible parties"—site owners and operators and users of sites such as transporters and waste generators. It also empowers the Federal government to sue such parties for the cost of cleanups paid for out of the Superfund and, if waste disposal may present an "imminent and substantial endangerment," to sue for orders directing responsible parties to clean up sites themselves. The Act is administered by the Environmental Protection Agency (EPA).

By early 1984, although EPA had responded to hazardous waste emergencies at many sites, only a handful of sites listed on a statutory national priority list by the agency had been completely cleaned up by the Federal government. A few more sites had been cleaned up by private parties. The causes of delay were varied: uncertainty about the extent of the problem and the efficacy of technical remedies; start-up problems inherent in a new program; and a two-year long effort to negotiate cleanups so that no Superfund revenues would have to be spent. By mid-1983, the strategy of conserving the Superfund had fallen apart amidst a major leadership crisis within the EPA. In a policy

reversal, Superfund expenditures for cleaning up sites then took priority over other means available under the statute for effecting cleanups.

The current agency approach to CERCLA emphasizes cleanups paid for out of the Superfund coupled with actions to recover the expenditures but also relies to a limited extent on negotiated cleanups and on lawsuits to compel responsible parties to act under CERCLA's imminent endangerment provision. This strategy has resulted in a CERCLA implementation effort that is slow and expensive.

Congress, the EPA, responsible parties, and other critics have suggested several means of speeding up and economizing on site cleanups. These include enlarging the Superfund, setting program deadlines, expanding the EPA program offices, empowering citizens to sue, and encouraging voluntary cleanup by industry. Although enlarging the Fund, providing more staff, and setting program deadlines would tend to accelerate the CERCLA effort, the Administrative Conference believes that a properly designed site cleanup negotiation process, through which responsible parties or third parties would agree to act directly to cleanup sites, would also hasten cleanup while reducing its expense by tapping the technical and financial resources of the private sector. Involvement of the Federal government and affected citizens in this process would ensure adequate protection of public health and the environment.

Although current EPA policy permits the negotiation of cleanups, the agency puts too little stress on negotiations and has adopted a series of procedural and substantive requirements that unnecessarily constrict the number of negotiated cleanup agreements that the agency might beneficially conclude. The Conference recognizes, of course, that successful negotiations can only occur when private parties as well as the Federal government are willing to respond to the problem of hazardous waste cleanup in good faith. The Conference intends no criticism of aggressive EPA enforcement efforts where responsible parties refuse to cooperate.

In this recommendation the Administrative Conference suggests a series of steps that the EPA might take to encourage and facilitate greater reliance on negotiated private party cleanups, in those situations where negotiations have a realistic chance of success.

RECOMMENDATION

1. The Environmental Protection Agency (EPA) should emphasize the negotiation of voluntary cleanups at hazardous waste dump sites. The nego-

tiation process for any site should include, at an appropriate time and in an appropriate manner, the key interests, such as Federal, State and local governments, parties potentially responsible for cleanup (including site users, site owners and operators, and waste transporters), and local citizens. Whenever possible, efforts to negotiate a cleanup agreement should begin well before the commencement of litigation concerning a site. To increase the likelihood that negotiations will succeed, the Administrator and other leading EPA officials, both at headquarters and in the regional offices, should support the negotiation process, follow its implementation, and be available to explain specific negotiated agreements before congressional oversight committees if necessary.

2. Citizens living in the vicinity of or otherwise directly affected by a site have a substantial interest in some issues related to the cleanup process—for example, medical diagnostic testing, relocation of public service facilities, measures to isolate the site, and the overall adequacy of the cleanup effort. Their interest in other aspects of the process, such as the allocation of costs among potentially responsible parties (or between potentially responsible parties and the government) is more problematic. EPA should consider means beyond complete reliance on local political institutions for involving these citizens, including the negotiation of collateral arrangements, participation of citizens' groups in negotiations over the type and scope of the remedy, and the like. Even if not participants, local citizens ordinarily should be permitted to observe those aspects of the negotiations that concern them.

3. Many negotiations can be conducted by EPA without outside assistance. In other cases, where outside assistance is desirable, EPA should encourage efforts by independent mediating organizations or individuals to convene negotiations. This can be accomplished by asking such a convenor at an early stage—no later than the commencement of "remedial investigations and feasibility studies" (a statutory cleanup stage)—to determine whether conditions are favorable for

negotiations at a site. Favorable conditions include: Issues that are ripe for decision; absence of fundamental conflict about values among those with a stake in the outcome; adequate representation and organization of key interests; opportunity for mutual gain for those with a stake; a balance of power among participants; willingness to bargain in good faith and share information; and willingness of units of government to participate as equal parties. Where negotiation appears feasible, the convenor should attempt to organize a site negotiation group from among the parties with a stake in the site cleanup. If an initial meeting of the parties is successful, the participants should consider retaining the convenor or another person to serve as mediator for the duration of negotiations. EPA should consider using Superfund resources to support an entity, such as a non-profit corporation or another agency, that would undertake this initial convening effort and provide mediation services if the parties desired them. Alternatively, EPA should consider providing these services through personal service contracts with skilled mediators.

4. In order to take advantage of private funds and expertise while they remain available, EPA should encourage and participate in negotiations for cleanup of sites where there is a high likelihood of successful negotiations, even if they have not yet been allocated federal funding for remedial investigations or been added to the National Priority List, unless such negotiations will distort the agency's priorities by diverting substantial agency resources or causing undue delay.

5. EPA should avoid wasting agency resources on unproductive negotiations by establishing, with the concurrence of other negotiating parties, reasonable deadlines for the conclusion of negotiations.

6. Successful negotiation requires that participation by all interests be through persons who, if not principals, have the confidence of, and easy access to, principals with the authority to make binding commitments. For EPA, the negotiators or persons readily accessible to the negotiators should have explicit, broad delegated author-

ity to commit the agency to a negotiated outcome. To the extent that peer review and approval of agreements within the agency are nonetheless required, EPA should provide expedited means for obtaining them. One method of achieving this end would be for EPA headquarters to consolidate review of negotiated cleanups in a single panel of key officials.

7. The final agreement should take the form of an administrative consent order under section 106 of CERCLA or a judicial consent decree. Like other parties to the agreement, EPA should bind itself to undertake appropriate actions and follow agreed-upon schedules.

8. Negotiations undertaken in the context of litigation require procedures and standards different from the procedures and standards applicable to negotiations occurring before a matter reaches litigation. EPA should acknowledge that existing agency guidance memoranda on "case settlement policy" are appropriate for use only in litigation situations; to implement the proposed negotiation process, the agency should prepare new guidance memoranda that bring more appropriate factors to bear on prelitigation negotiations.

9. The Conference recognizes EPA's need to maintain a strong litigation posture in CERCLA cases in order to strengthen its ability to negotiate agreements in the public interest. However, the Conference also urges the agency to consider the possible advantages of greater flexibility in situations where cleanup arrangements are being negotiated rather than litigated. For example, in some cases it might be desirable for EPA to begin to negotiate even if 80% of cleanup costs has not been offered or to agree with the parties about the amounts of their individual responsibilities to pay cleanup costs even if the total responsibility adds up to less than 100 percent of cleanup costs (allocating Superfund resources to pay for the rest), as an incentive for cooperating parties to join promptly in an agreement. The intransigence of a few responsible parties should not be permitted to block agreement with others prepared to accept reasonable shares of responsi-

bility; moreover, such partial agreements may free agency resources to pursue the intransigent parties.

10. Although the Conference believes that its recommendation can be implemented without additional legislation, it acknowledges that the effectiveness of expanded reliance on negotiated cleanups would depend upon the degree of support or opposition from relevant congressional committees. If EPA undertakes efforts to clean up dump sites through a negotiation process like that described in this recommendation, congressional committees should support and encourage these efforts, recognizing that negotiated solutions inevitably involve compromises.

11. To promote achievement of its site cleanup management objectives, EPA should publish statements of its CERCLA policies, such as conditions for undertaking voluntary cleanup negotiations, procedures for public involvement in site cleanup decisions, and site study criteria, in the *FEDERAL REGISTER* and allow for public comment.

[49 FR 29942, July 25, 1984]

§ 305.84-5 Preemption of State Regulation by Federal Agencies (Recommendation No. 84-5).

States have the power to regulate many forms of conduct. Each state must have broad power to regulate in ways that it believes to be in the best interests of its citizens, subject to the limitations stated in the federal and state constitutions. The nature and magnitude of the problems that require regulatory action vary substantially among the states, and state governments are normally in a better position than the federal government to determine the types of regulations that will serve the interests of the states' citizens. States sometimes have an incentive, however, to impose regulations that advance state interests at the expense of other states' interests or of national interests.

Federal courts have applied the Commerce Clause to limit state power to affect national interests only in those few cases where the state action clearly discriminates against interstate commerce or protects in-state economic interests from out-of-state competition. Institutionally, however, courts are ill-suited to attempt to limit state power to harm national interests when state regulation furthers in-state interests of one

type while it simultaneously frustrates a national interest of a different type.

Congress can limit state power to harm national interests by (i) expressing in a statute a congressional intent to occupy a field completely, (ii) explicitly preempting the specific type of state regulation at issue, or (iii) imposing a Federal regulatory duty directly in conflict with a duty imposed by a state. The conflict, delay, and uncertainty of outcome that occurs when preemption questions must be resolved by the judiciary can be avoided if Congress addresses preemption issues clearly and explicitly when enacting regulatory statutes. The congressional agenda is so crowded, however, that Congress cannot be expected to consider explicitly and in detail all of the forms of state regulation that may harm the national interest. Congress experiences particular difficulty anticipating and resolving directly the many arguable conflicts between the national interest and new state regulations issued in the aftermath of a Federal decision to deregulate an area of conduct.

Because of the limited ability of Congress and the judiciary to act as checks on state regulation that harms the national interest, states possess, in practice, the power to make regulatory choices that produce net benefits within the state but that produce substantial net detriments on a national level. Without an additional Federal constraint on state regulatory power, states can be expected to regulate in this manner frequently.

Federal agencies can play a valuable role in supplementing judicial and congressional constraints on state regulation. Courts regularly affirm federal agency actions that preempt state regulations when the preemptive effect of the Federal action is no broader than can be justified by the evidence of need for preemption. Federal agencies sometimes consider preemption of a state law or regulation, however, without providing affected states notice and an opportunity to participate effectively in the agencies' proceedings.

A Federal agency considering a regulatory action—whether to expand or reduce regulatory constraints—should be sensitive both to the need to preempt state laws that seriously disrupt the Federal program, and to the need to take into account the states' special needs and circumstances.

RECOMMENDATION

1. Congress should address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct.

2. Each Federal agency should establish procedures to ensure consider-

ation of the need to preempt state laws or regulations that harm federally protected interests in the areas of regulatory responsibility delegated to that agency by Congress, and each agency should clearly and explicitly address preemption issues in the course of regulatory decision-making. Particularly in the circumstances where a Federal regulatory program is being reduced or eliminated (deregulation), an agency needs to be alert to the form and magnitude of state regulation that may exist—or may be quickly adopted to fill a perceived void left by the diminished Federal regulation.

3. When a Federal agency foresees the possibility of a conflict between a state law or regulation and federally protected interests within the federal agency's area of regulatory responsibility, the agency should, when practicable, engage in informal dialogue with state authorities in an effort to avoid such a conflict.

4. When a Federal agency proposes to act through agency adjudication or rulemaking to preempt a state law or regulation, the agency should attempt to provide all affected states, as well as other affected interests, notice and an opportunity for appropriate participation in the proceedings.

[49 FR 49838, Dec. 24, 1984]

§ 305.84-6 Disclosure of Confidential Information Under Protective Order in International Trade Commission Proceedings (Recommendation No. 84-6).

This recommendation concerns the protective orders practice of the United States International Trade Commission in anti-dumping and countervailing duty proceedings. Under the Trade Agreements Act of 1979, the Commission has authority to release to counsel, under protective order, certain confidential business and financial information that is submitted to it by parties in such proceedings.

The export to the United States of goods at less than their fair value (called "dumping") and the subsidization by foreign governments of exports of their countries' products to the United States are treated by American law as unfair methods of international trade. If dumped or subsidized imports are found to cause or threaten material injury to an industry in the United States, the Tariff Act of 1930, as amended

by the Trade Agreements Act of 1979, provides for imposition of a duty in an amount intended to offset the margin of dumping or subsidy. There must be two determinations: (1) Whether the imports in question have been dumped or subsidized, which is decided by the International Trade Administration of the Department of Commerce ("ITA"), and (2) whether the imports are causing or threatening injury to an industry in the United States, which is decided by the International Trade Commission ("ITC").

The injury proceeding at the ITC is substantially the same for both types of cases, known respectively as antidumping and countervailing duty proceedings. The ITC conducts a preliminary investigation in which it must determine within 45 days whether there is a "reasonable indication" that the injury test will be met. If its determination is negative, the entire antidumping or countervailing duty proceeding (including the portion conducted by the ITA) is terminated. If the ITC's determination is affirmative, and the ITA has made an affirmative determination that the imports are being dumped or subsidized, the ITC conducts a final investigation to reach a determination, which usually must be made within 120 days, whether the imports are threatening or causing injury to an industry in the United States.

In both stages of the proceeding, the ITC gathers extensive information from American producers, importers, and purchasers of the products in question. The Trade Agreements Act of 1979 authorizes the ITC to make available, under protective order, confidential business information that it has received in these proceedings. Under this authority, the ITC releases the confidential data of one party to counsel for other parties. In almost all cases those other parties, to whose counsel the confidential information is disclosed, are business competitors of the party that submitted the information. The only companies whose confidential information is disclosed are those American companies that complain of injury from the alleged unfair import practices. Confidential data concerning their prices and cost of production can be released to counsel for both their domestic competitors and their foreign competitors. In addition, all confidential information submitted to the ITC, regardless of the submitter's identity, may ultimately be disclosed, under judicial protective order, in proceedings to review ITC determinations before the Court of International Trade ("CIT").

Throughout its proceedings, the ITC devotes great care to maintaining the security of confidential business information which is submitted to it or is gathered in its investigations. Agency regulations provide procedures for requesting confidential treatment of proffered information, and the staff in

practice accords confidential treatment without specific request to information acquired in response to questionnaires and other investigative inquiries. The record of each antidumping and countervailing duty injury proceeding is divided into public and nonpublic sections. Pleadings, staff documents, and ITC opinions are prepared and submitted under procedures designed to avoid the public disclosure of confidential information.

The principal concern here is not with the agency's internal procedures, but with the potential misuse of parties' information which has been received under protective order by lawyers or other parties. A particular concern is that such information will, willfully or inadvertently, be passed along by a lawyer to his client, who then can make competitive use of it against the American company that submitted it. Though there is little hard evidence of such improper disclosure, there is much suspicion that it occurs. It is believed that the perceived risk of wrongful disclosure generates a chilling effect which, by discouraging voluntary submission of essential information, hampers the International Trade Commission's ability to do its job. The ITC's responsibility is to determine whether the allegedly unfair imports are threatening or causing "injury"—not simply injury to individual American companies as such, but injury to the entire "industry" affected by competition from the imports. If American companies fear that their confidential business data will leak to their competitors, and for that reason refuse to submit such information, the Commission will be unable to assemble the complete industry figures it needs for a soundly-based determination of injury. Although the agency has the power to subpoena the necessary information, the short statutory deadlines it must meet and its own limited resources to procure enforcement of subpoenas make heavy reliance on voluntary cooperation a practical necessity.

Another area of concern arises from the circumstance the existing ITC practices do not adequately inform submitters of information of the high likelihood that confidential price and cost of production information will be disclosed, nor of the possibility that other confidential information may be disclosed, without further warning, in review proceedings before the CIT.

These recommendations propose that the ITC (and, in one case, the CIT) establish a series of measures intended to reduce the risks of disclosure, protect submitters and safeguard the process of making disclosure of price and cost of production data. In some circumstances, these measures would preclude disclosures that are now permitted. No recommendation is made to reduce the categories of information that are required

by statute to be disclosed. Indeed, the ITC might appropriately consider some enlargement of the classes of information it will release under protective order to facilitate more meaningful analysis of the information now disclosed. Any broader disclosure should be accompanied by the safeguards herein recommended, and should be provided only if the Commission's investigative and decisional processes will clearly be improved thereby.

RECOMMENDATIONS

A. Limiting the Exposure of Confidential Information

1. The International Trade Commission should provide for the disclosure of confidential information during the preliminary investigation phase of its antidumping and countervailing duty injury proceedings only in circumstances in which disclosure is important to achieving the limited purposes of the preliminary investigation itself.

2. Confidential information submitted by a domestic producer party should not be disclosed to counsel for any other domestic party (except a United States importer which is an interested party within 19 U.S.C. 1677(9)(A)).

3. The Commission by regulation or policy statement should define and specify the kinds of data which are disclosable as "information concerning the domestic price and cost of production of the like product."

B. Protection of Submitters' Interests

1. The Commission's questionnaires should more clearly inform petitioners and supporters of the petition about the likelihood that their confidential price and cost of production information (whether submitted in response to the questionnaire or otherwise) will be disclosed by the Commission under protective order to counsel for competitors of the submitter.

2. The Commission's questionnaires and other inquiries, by which confidential information is requested from parties and nonparties, should be accompanied by a statement that all such information of whatever kind (not merely that in the price and cost of production categories) is subject to disclosure by the Court of International Trade, under protective order, to

counsel for any party to a judicial review proceeding involving such information.

3. Although in practice the Commission does not require the submitters of responses to questionnaires and follow-up inquiries to make specific request that the information submitted be treated as confidential by the Commission, its regulations (19 CFR 201.6) do require such a specific request. The regulations should be modified to reflect the practice.

4. The Commission's regulations should be conformed to 19 U.S.C. 1677f(b), which requires the Commission to treat as confidential any information so designated by the submitter, unless the Commission requests an explanation and is unpersuaded by it, in which event it must return the information to the submitter.

5. The Commission should establish by regulation an informal procedure whereunder the submitter may object to disclosure of its information under protective order, except in cases of extraordinary urgency. Commission regulations should also provide that, when the submitter is given notice of an application for disclosure of its information, it also be advised specifically of the procedures whereunder it may object.

6. With respect to a requirement that the requester show a need for confidential information before it can be released under protective order, for the ordinary case the Commission should continue its present practice whereunder a simple statement of need, rather than a showing of need, suffices. Where extraordinary sensitivity or other unusual considerations are demonstrated by the submitter, the Commission should require an actual showing of substantial need before releasing the information. The Commission's regulation (19 CFR 207.7(a)), which purports to require the requester to "demonstrate[] a substantial need for the information in the preparation of his case" in all instances, should be modified accordingly. In all cases the statement of need should be accompanied by a statement of the requester's intent to participate actively in the proceeding.

7. The Court of International Trade should seek to provide in proceedings for judicial review of ITC injury determinations in antidumping and countervailing duty cases, that nonparty submitters be given notice and a meaningful opportunity to object to the release under protective order of any confidential information which they had submitted to the International Trade Commission.

C. Counsel's Responsibilities Under Protective Orders

The Commission's regulations and protective orders should provide by specific language that the attorney who has received information under protective order may be personally liable to sanctions (1) for a breach of the protective order by other persons—such as attorneys, experts, and support staff working on the case—to whom the attorney, under the authority of the protective order, has divulged the confidential information or (2) where the attorney has been shown to have been negligent in the custody of such information and unauthorized disclosure has resulted.

D. Possible Broader Disclosures

1. Confidential price and cost of production information submitted to the Commission by importer and foreign parties to the investigation should be made available under protective order to counsel for domestic parties to the investigation, or at least to those who support the petition.

2. The Commission should consider disclosing under protective order further kinds of confidential information pertaining to price and cost production, beyond what is now disclosed, to the extent such further information can facilitate more meaningful analysis of the kinds of information that are now disclosed.

3. The Conference takes no position on whether or not the Commission should consider disclosing confidential information in categories other than price and cost of production. If the Commission does consider such disclosure, it should make such disclosure only (a) in categories where party analysis of such information is likely to assist the Commission's investiga-

tion without impeding its fulfillment of statutory deadlines, (b) in cases in which the requester shows a substantial need for access to the information and (c) under additional safeguards including as appropriate those recommended herein.

[49 FR 49838, Dec. 24, 1984]

§ 305.84-7 Administrative Settlement of Tort and Other Monetary Claims Against the Government (Recommendation No. 84-7).

In the Federal Tort Claims Act and dozens of other statutes,¹ Congress has authorized agencies to provide compensation for losses occasioned by a variety of agency actions. The FTCA, the centerpiece of this array, essentially waives the government's sovereign immunity to damage actions arising out of the negligent or otherwise wrongful acts committed by Federal employees while acting within the scope of their employment. Previously Congress had been burdened by numerous private bills to redress government torts. The FTCA sought initially to shift to the courts primary responsibility for determining whether redress was warranted. In 1966 the FTCA was amended to transfer much of that load to agencies. At that time, Congress required claimants to present claims to the responsible agency as a prerequisite to suit and gave the agency a minimum of six months in which to act upon them. The agencies were also given an unprecedented degree of settlement autonomy. The FTCA requires that the exercise of this authority be "in accordance with regulations prescribed by the Attorney General," but does not subject it to detailed procedural mandates apart from the requirement that the Department of Justice approve large settlements.

This relatively inconspicuous administrative process has taken on considerable significance in dealings between agencies and individual claimants, and could gain even more if Congress acts to displace suits

¹ "Meritorious claims" statutes allowing agencies to entertain some kinds of claims even where no fault can be shown, include the Military and Foreign Claims Acts and statutes covering certain actions of the Departments of Agriculture and Justice, NASA, the NRC, the Peace Corps, and the Postal Service. Other ancillary statutes, like the Suits in Admiralty Act, Public Vessels Act, Copyright Infringement Act, Trading with the Enemy Act, and Swine Flu Immunization Act, complement the FTCA, for instance by addressing claims likely to be exempt from that Act.

against individual Federal officials by an expansion of the government's liability under the FTCA.² Available information suggests that the administrative process resolves a high proportion of claims worth paying at the same time as it exposes the unmeritorious character of many of the thousands of claims filed annually. In both ways, it effectively replaces litigation with a largely informal, relatively open, and potentially non-adversarial means of dispute resolution.

Although the present system seems generally to be serving Congress' purposes, it has not been without difficulties. In particular, the extent to which administrative settlement should be taken as an autonomous dispute resolution process, is unclear. In some agencies the claims officer approximates a neutral decisionmaker, objectively appraising something in the nature of an inchoate entitlement. Other agencies view their claims officers as adversaries of the claimant engaged in tactical maneuvers that are preludes to litigation or to bargaining for a financially advantageous settlement of sustainable claims.

The Conference, though not recommending any radical restructuring of the agency claims process, believes that this ambiguity has sometimes produced undesirable results. Inappropriately adversarial responses to technical deficiencies, restrictive policies on information disclosure in connection with pending claim, and less than fully fair and objective approaches to determining the merits and monetary value of a claim do not serve the purposes of the FTCA, nor do they enhance confidence in claims officers' determinations. Claimants, who may obtain a trial *de novo* before a Federal judge after a wait of only six months, are finding the judiciary to be increasingly sympathetic, perhaps in part because some of the judges doubt the fairness and efficiency of some of the agencies' claims handling. To further administrative effectiveness, the Conference recommends the following fine-tuning of the FTCA, of certain agency practices, and of the Department of Justice's regulations.

RECOMMENDATIONS

A. Agency Exercise of Settlement Authority

1. Providing Guidance to Claimants.

(a) Agency claims officers, as part of their duties, should take reasonable steps to save a claimant who has come forward with a potentially deserving claim from innocently failing to per-

fect a valid statutory demand, committing technical error, or running afoul of a statute of limitations. Among other things, claims officers should promptly advise claimants of formal deficiencies so as to give claimants an opportunity to cure them. Further, in the case of deficiencies relating solely to the requirements of the Attorney General's or agency's regulations, as opposed to jurisdictional requirements of the FTCA itself, the agency should consider extending the claimant an opportunity to cure such deficiencies for a reasonable time beyond the ordinary limitations period.

(b) Each agency General Counsel's office should compile and publish in the CFR a list briefly describing statutes under which the agency is authorized to entertain monetary claims and the name and telephone number of the agency personnel in charge of each program. In appropriate circumstances, claims officers should make a copy of the list available to claimants.

2. *Filing the Claim.* (a) The Attorney General should amend his regulations to treat an FTCA administrative claim as still timely though received after expiration of the statute of limitations, provided that the claimant can demonstrate that he or she sent it by an ordinarily effective means of delivery before expiration of that period.

(b) Agencies should require claims officers to advise claimants that the absence of a sum certain for all categories of claims may preclude their consideration by both agency and court, and that, subject to timely amendment and the existing statutory exceptions, the amount of the administrative claim constitutes a ceiling on the damages that may later be sought in court.

3. *Substantiation of Claims.* Where exchanges with a claimant reveal an insufficiency of information submitted in support of the claim, agency claims officers should promptly and clearly advise the claimant whether the continued nonproduction of designated information will, in the officer's view, warrant dismissal of the claim as invalid because of incomplete documentation.

4. *Access to Information.* Agencies should endeavor, particularly when a

² See ACUS Recommendation 82-6, Federal Officials' Liability for Constitutional Violations.

claimant seeks access to his or her claim file or to other information relating to a pending claim, to promote a mutually free and open exchange of relevant information. Agencies should consider release even when applicable statutes would not require it if more extensive disclosure might advance settlement. Specifically, agency claims officers should not routinely regard the information they assemble in connection with an administrative tort claim as falling within the government's executive privilege for deliberative materials, or the attorney-client, expert witness, or qualified attorney work product privileges, and in appropriate circumstances claims officers should be prepared to disclose information falling within those privileges.

5. *Claims Decisions.* (a) Agencies should give a brief statement of the grounds for denial whenever an FTCA or other claim is rejected.

(b) An agency claims officer's ultimate goal should be a fair and objective assessment of the merits of a claim and of its monetary worth. In addition, the Department of Justice should not exercise its statutory approval authority over large administrative settlements in a manner that would tend to discourage claims officers from making serious efforts to reach a fair and objective settlement with a deserving claimant.

6. *Reconsideration.* (a) Claim denial letters should inform claimants that they may request the agency's reconsideration of its denial, and that such a request extends the six month waiting period before suit may be filed in federal district court.

(b) In cases where the claimant communicates with the claims officer following final denial, the officer should promptly indicate whether or not, in his or her view, the communication constitutes a request for reconsideration and state specifically the procedural implications of that determination.

B. Statutory Changes

1. Congress should conduct a comprehensive reexamination of the meritorious and other ancillary claims statutes in force to ensure that each is warranted and that, together, they

form a coherent whole both on their own terms and in relation to the FTCA. Congress should systematically raise ceilings on all agency authority to settle claims where inflation has rendered obsolete the present levels.

2. Congress should amend 28 U.S.C. 2401(b) to provide that, where a claim has been filed with the wrong agency in a timely manner and transferred to the appropriate agency, the original date of filing will be used for determining timeliness. To help ensure that agencies have an adequate and predictable length of time to investigate and consider claims, Congress should provide that the six-month period given the agencies for that purpose not commence until the claim has been received by the appropriate agency.

3. Congress should further amend 28 U.S.C. 2401(b) to provide that, where an otherwise timely damage action against a person for whose tortious conduct Congress has made the federal government exclusively liable is converted into a suit against the government under the FTCA and then dismissed for failure to file a prior administrative claim, the plaintiff shall have 60 days from the date of such dismissal or two years from the date the claim arose, whichever is later, in which to file such a prior claim.

[49 FR 49840, Dec. 24, 1984]

§ 305.85-1 Legislative preclusion of cost/benefit analysis (Recommendation No. 85-1).

Cost/benefit analysis¹ may ordinarily be applied by an agency to a regulatory action, except when Congress has forbidden its use or has specified, in the authorizing legislation, the precise regulatory outcome Congress desired. Any legislative directive short of complete specificity, however, can lead to disputes as to whether Congress intended—or even contemplated—the application of cost/benefit analysis by the agency in the

¹The term "cost/benefit analysis" is used here to include all forms of analysis (cost/benefit, cost effectiveness, risk/benefit, etc.) in which the potential costs, benefits, and risks of a proposed action, along with possible alternative courses of action, are quantified if feasible and appraised in relation to one another. See Recommendation 79-4.

agency's adoption of legislative rules to carry out the program. Disputes about the agency's authority can undermine the regulatory program, and may last for decades, only to be resolved, and then perhaps only temporarily, in a judicial—rather than a legislative—forum. Protracted disputes over an agency's authority to apply cost/benefit analysis can be largely avoided by direct congressional attention to the matter.

RECOMMENDATION

When enacting regulatory legislation, if Congress intends to prohibit the application of cost/benefit analysis by the agency charged with administering the regulatory program, Congress should explicitly so state.

[50 FR 2836, July 12, 1985]

§ 305.85-2 Agency procedures for performing regulatory analysis of rules (Recommendation No. 85-2).

Since 1974 executive branch agencies have been subject to a series of Presidential executive orders that required agencies to prepare comprehensive impact analyses for major rulemaking proposals. Various terms "inflation impact statements," "regulatory analyses," and "regulatory impact analyses," these analyses were all designed to identify or measure the costs and benefits of rulemaking options being considered by Federal administrative agencies. Congress also has imposed impact analysis requirements on administrative agencies through the National Environmental Policy Act of 1969, the Regulatory Flexibility Act of 1980, and by amendments to authorizing statutes for particular agencies.

The regulatory analysis function has become increasingly formalized within agencies as a result of the proliferation and durability of these requirements. This Recommendation is based on a Conference study of the ways agencies have incorporated the regulatory analysis function into their decisionmaking process. A general conclusion from this study is that regulatory analysis can be a useful device in rulemaking if it is taken seriously by upper level agency decisionmakers; the regulatory analysis function is effectively integrated into the rulemaking process, and the limitations of regulatory analysis are recognized by those who rely upon it.

The Recommendation contains specific advice on the use and limits of regulatory analysis and on integration of regulatory analysis into the agency rulemaking process. Unless expressly so stated, the Recommendation is not intended to address application of the Freedom of Information Act to agency records used in regulatory analysis.

In particular, it is not intended to expand or decrease the statutory protections afforded trade secrets and commercial or financial information obtained for use in regulatory analysis.

RECOMMENDATION

1. *The Use of Regulatory Analysis to Identify Options*

Regulatory analysis¹ can be most useful to agency decisionmakers in identifying regulatory options if the regulatory analysis function is an integral part of the agency decisionmaking process. To make regulatory analysis a more effective device for identifying options, agencies should adopt the following practices:

¹The following definitions are used in this recommendation:

"Regulatory analysis" is a comprehensive analysis of the economic, social, and environmental impacts of one or more alternatives for addressing a problem undertaken in connection with an agency rulemaking effort. A regulatory analysis may include or be separate from an environmental impact assessment of a rule prepared in compliance with the National Environmental Policy Act of 1969.

A "regulatory analysis document" is a written regulatory analysis, whether drafted to comply with Executive Order 12,291, the Regulatory Flexibility Act, or other statutes and executive orders. Regulatory analysis documents also may include similar documents which, though not required by statute or executive order, are prepared to comply with agency regulations or directives stating that the agency intends to treat the documents as regulatory analyses. The term "regulatory analysis document" is intended to include only final analyses prepared in connection with a proposed or a final rule.

A "regulatory analyst" is an agency employee who prepares the whole or part of a regulatory analysis. Regulatory analysts often are economists or policy analysts by training, and they often are assigned to a separate institutional unit within an agency.

The "technical staff" is composed of agency employees within a program office who conduct investigations, prepare technical support documents, and often draft preambles and recommended language for proposed and final agency rules. When a member of the technical staff is assigned to perform a regulatory analysis, he or she then is both a regulatory analyst and a member of the technical staff.

a. When an agency begins intensive information-gathering and other analytical efforts on a rule, the agency's technical staff and regulatory analysts should attempt, at an early stage, to identify a broad range of regulatory options.

b. Agencies should experiment with a phase system of reducing options. Under a phased system, the agency initially should identify as large a number of options as it can for brief study. As options are considered and rejected, the remaining options should be analyzed with increasing thoroughness. As resource constraints preclude further consideration of an option, the agency should list the option in its regulatory analysis document and explain briefly why the option did not warrant further study.

c. Although the extent to which options are identified and analyzed in regulatory analysis documents is largely a matter for individual agency management, regulatory analysis documents normally should attempt to identify and analyze several realistic regulatory options.

2. Integrating Regulatory Analysis Into the Decisionmaking Process

a. *Timing of Analytical Input.* If regulatory analysis is to be used in a rulemaking, the agency decisionmaking process should be structured to involve agency regulatory analysts early in the evolution of the rule, before alternatives have been eliminated. Regulatory analysis should not be used to produce post hoc rationalizations for decisions already made, nor should it be allowed to unduly delay rulemaking proceedings.

b. *Communicating Policy to Regulatory Analysts.* Regulatory analysis can be a valuable tool for communicating policy within regulatory agencies because a primary function of regulatory analysis is to measure regulatory options against agency policy goals. Upper level policymakers in agencies should provide clear guidance to subordinate decisionmaking units (such as steering committees and working groups) on the policies that should guide the agency in choosing among options in individual rulemaking proceedings.

c. *High Level Involvement at Important Decisionmaking Junctures.* Because of the different perspectives of an agency's regulatory analysts and its technical staff, disagreements over appropriate agency policy will often result when both staffs are relied upon in the decisionmaking process. The agency should adopt procedures that will encourage resolution of such disagreements at important decision-making junctures at a high policy level.

d. *Regulatory Analyst's Role in Responding to Comments.* When an agency solicits public comment on a regulatory analysis document or on provisions of a proposed rule that are supported by the regulatory analysis document, the agency should structure its decisionmaking process to ensure that the agency's regulatory analysts participate in developing the agency's response to the public comments.

e. *Intragovernmental Comments.* Agencies should place in the public file of the rulemaking proceeding any material factual information (as distinct from indications of governmental policy) from other agencies that is directed to the contents of regulatory analysis documents. See ACUS Recommendation 80-6 (1 CFR 305.80-6).

f. *Public Availability of Regulatory Analysis Documents.* Agencies should make regulatory analysis documents available to the public when they publish proposed and final rules in the FEDERAL REGISTER, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. § 552(b)(5), might apply to portions of the documents. As appropriate, agencies also should prepare brief summaries of regulatory analysis documents and make them available to the public and appropriate congressional committees. The summaries should contain tables, charts, and other devices, as needed, to make the information contained in the regulatory analysis documents understandable.

3. Use of Regulatory Analysis Where Not Required or Where Options Are Foreclosed

a. Regulatory analysis documents should identify the costs and benefits of reasonable options, even if the agency may lack the statutory authority to implement some of the options. If the agency determines that the best options cannot be implemented under its statutory authority, the agency should so inform the institutions with power to implement them, such as Congress and other agencies.

b. Agencies should consider using regulatory analysis when undertaking significant rulemaking proceedings with projected impacts falling below the established thresholds for requiring formal regulatory analyses.

4. Information in Regulatory Analysis Documents

This part of the Recommendation addresses the information that should be included in regulatory analysis documents for use by the public and agency decisionmakers.²

a. When agencies use quantitative models to quantify important variables in regulatory analysis documents, the known limitations of those models should be clearly stated.

b. To prevent quantitative models from oversimplifying complex decisionmaking factors, agencies should require regulatory analysis documents to (1) state clearly the major assumptions that undergird the models relied upon in the regulatory analysis, and (2) describe important decisionmaking variables that are not subject to quantitative analysis.

c. Agencies should require that regulatory analysis documents attempt to characterize the uncertainties that are included in quantitative predictions by using tools such as confidence intervals, multiple assessment models, sen-

sitivity analysis, and worst case analysis.

d. Agencies should require that regulatory analysis documents address explicitly the distributional impacts of rulemaking options and the methods used for discounting future costs and benefits. Agencies should consider using more than one discount rate to clarify the sensitivity of the analytical projections to the discount rate.

e. Agency regulatory analysis documents should make explicit reference to any agency policies that motivate the agency to choose one set of assumptions over another, draw one inference rather than another, or choose one quantitative model over another.

5. Informational Needs for Regulatory Analysis

a. *Agency Access to Information.* Adequate information on the costs and economic impacts of proposed rules is essential to the regulatory process, and often the most important source of this information is a regulated party. Therefore, in exercising its authority under the Paperwork Reduction Act, the Office of Management and Budget should allow agencies to address reasonable requests for cost and economic impact information to regulated parties when the information is needed for regulatory analysis. The Office of Management and Budget should continue to coordinate its regulatory analysis review function with its paperwork reduction function to ensure that it approves information-gathering activities that are designed to yield information that it is likely to require later in the rulemaking review process.

b. *Coordination of Information Gathering Activities.* Agencies should coordinate their sponsored research activities with their regulatory analysis initiatives. More specifically, agencies should include regulatory analysts in their process for setting long-term research priorities. In addition, agencies should encourage the participation of representatives from the office responsible for agency-sponsored research in the rulemaking process at the very early stages when informational needs are defined.

²The Conference has previously recommended that agencies using cost-benefit and similar analyses include in notices of particular proceedings certain information about the analytical methods and assumptions used in conducting the analyses. See ACUS Recommendation 79-4 (1 CFR 305.79-4).

c. *Cooperative Regulatory Analysis.* Agencies should consider whether the techniques suggested for negotiation of proposed regulations in ACUS Recommendation 82-4 (1 CFR 305.82-4) might be useful in undertaking, in specific proceedings, "cooperative regulatory analysis." This would consist of bringing representatives of all affected parties together, consistent with the Federal Advisory Committee Act where applicable, to assess the validity of particular studies prior to relying upon those studies in regulatory analysis documents.

d. *Reducing Potential Bias.* Agencies should attempt to reduce the impact of bias in the sources of the information that they use in preparing regulatory analysis documents. Though agencies should consider the source of information in giving it weight, this does not mean that they should automatically attach less value to information simply because it comes from a source with an interest in the outcome of the rulemaking. Agencies should reduce the impact of bias by:

(i) Consulting, whenever possible, multiple sources of information in preparing regulatory analysis documents;

(ii) Carefully citing in regulatory analysis documents all information upon which the analysis draws, and making the information available for public scrutiny at convenient times and places;

(iii) Actively soliciting comment and criticism from acknowledged experts in the fields that the documents address.

e. *Retrospective Assessments of Previous Analyses.* Agencies should regularly perform retrospective assessments of the predictions made previously in regulatory analysis documents. Retrospective analysis can provide information on the accuracy of past agency predictions and thereby enable an agency to increase the accuracy of future predictions or make judgments about the value of regulatory analysis to its regulatory effort.

6. Use of Consultants in Preparing Regulatory Analysis Documents

Agencies can benefit from entering into consulting contracts with qualified experts to aid in gathering and

analyzing information for regulatory analysis documents. However, agency personnel should retain the ultimate responsibility for the contents of regulatory analysis documents and guard against consultant conflict of interest. To these ends, agencies should ensure that: (1) Agency employees, not consultants, draft regulatory analysis documents, and (2) when a regulatory analysis document relies upon consultant reports, the reports are placed in the public file of the rulemaking proceeding, even if the Freedom of Information Act's exemption for intra-agency memoranda, 5 U.S.C. 552(b)(5), might apply to portions of the reports.

7. The Scope and Limits of Regulatory Analysis

a. Cost-benefit analysis is an effective tool for marshalling and analyzing information and for establishing regulatory priorities.

b. Other analytical techniques, such as cost-effectiveness analysis and multi-objective analysis, are also useful for rulemaking that involves health, environmental, historical, artistic, and aesthetic considerations for which markets do not exist.

c. Agency rulemaking decisions must take into account the limits of the agency's statutory authority and its overall policy goals, as well as the limits of the methods and data used in the regulatory analysis.

d. The same criteria should be used in granting exemptions from regulatory analysis requirements, irrespective of whether the proceeding has been commenced to formulate new rules or to amend or repeal existing rules.

[50 FR 28364, July 12, 1985]

§ 305.85-3 Coordination of public and private enforcement of environmental laws (Recommendation No. 85-3).

Congress has incorporated into the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and other Federal environmental statutes provisions authorizing private parties to bring enforcement actions in the Federal courts. These "citizen suit" provisions generally permit any person or organization to seek injunctions abating activities that violate agency rules, standards, or permits. In addition, the

Clean Water Act and the Hazardous and Solid Waste Amendments of 1984 permit plaintiffs to seek civil penalties in private enforcement actions.

As use of private enforcement actions has grown, issues related to coordinating public and private enforcement activities have arisen. Coordination in the development and use of criteria regarding the bringing of cases and maintaining basic consistency in the imposition of penalties is important for several reasons. Notwithstanding the different enforcement perspectives and goals of public and private plaintiffs, inconsistencies in case selection or penalty policy may create actual and perceived unfairness to regulated entities, as similarly situated parties receive varying treatment. Uncertainties about the likelihood or outcome of enforcement actions may increase litigation and decrease voluntary compliance. Lack of coordination may also make it difficult for the Environmental Protection Agency and cooperating state agencies to deploy their limited enforcement resources in the most efficient and effective manner. The recommendation that follows proposes administrative steps which the Environmental Protection Agency can take to provide better guidance to those involved in the enforcement process, and to achieve better coordination between public and private enforcement.

RECOMMENDATION

1. Articulation of Enforcement Policy

In order to achieve better coordination between public and private enforcement efforts, the Environmental Protection Agency should, as feasible, enunciate its views concerning enforcement criteria, calculating penalties, and settling contested cases. When enunciated, the agency's views, or an announcement of their availability, should be published in the *FEDERAL REGISTER*.¹ Public knowledge of the means by which the EPA calculates penalties will be particularly helpful to courts performing similar calculations in private enforcement actions, and the agency should consider whether more detailed specification of its policies in this respect is feasible. EPA should offer opportunities, consistent with Recommendation 76-5, for

¹In administering the Clean Water Act, for example, the EPA has begun this process by issuing a proposed rule to revise program reporting requirements for the assessment of permit noncompliance. See, e.g., 49 FR 29720 (July 23, 1984).

public comment on statements of policy regarding calculation of penalties.²

2. Improvement of Information Systems

The availability of accurate, complete, and current information about (a) the compliance status of regulated persons and firms, and (b) the outcome of public and private enforcement actions, is essential both for the formulation and implementation of agency enforcement strategies and for the effective use of private enforcement actions. When designing management information systems and reporting requirements, the Environmental Protection Agency should consider improving the quality of such information and its availability for private enforcement, subject to statutory limitations on disclosure of confidential information. The Office of Management and Budget should give similar consideration to the role of compliance information when reviewing EPA data-gathering proposals.

3. Notice of Private Actions

When the Environmental Protection Agency receives from a private party notice of an alleged violation, the EPA should request from that party copies of all complaints³ and other significant pleadings, settlement agreements, and judicial decrees in any action relating to the alleged violation, in which the EPA is not a party.⁴

²See Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 4 ACUS Recommendations and Reports 62 (1979), 1 CFR 305.76-5. The Administrative Conference recommended that agencies adopting significant interpretive rules or policy statements normally should provide an opportunity for public comment.

³The Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, section 401 (to be codified at 42 U.S.C. 6972 (b)(2)(F)), provide that a plaintiff bringing an action under the citizen suit provision of the Resource Conservation and Recovery Act must serve a copy of the complaint on the Attorney General and the Administrator of the EPA.

⁴Nothing in this recommendation is intended to suggest that a request for or re-

Continued

[50 FR 28366, July 12, 1985]

§ 305.85-4 Administrative Review in Immigration Proceedings (Recommendation No. 85-4).

The Immigration and Nationality Act of 1952, as amended, requires the Justice Department to make two major types of decisions affecting aliens—whether to exclude aliens seeking to enter the United States and whether to deport those already in the country. The Act and the accompanying regulations also require a host of collateral decisions concerning visa petitions, waivers of grounds for exclusion or deportation, adjustment of status from non-immigrant to permanent resident, and many other immigration-related matters. Responsibility for making these decisions resides in two very different types of officials. Immigration judges, who are part of the Justice Department's Executive Office for Immigration Review, conduct formal evidentiary hearings in deportation, exclusion, and certain other proceedings. District directors and their subordinates are part of the Immigration and Naturalization Service (I.N.S.). They decide numerous other matters in far less formal proceedings. While the immigration judges have only adjudicative responsibilities, the district directors are principally responsible for the administration and enforcement of the immigration laws within their local geographic districts.

Similarly, there are two channels of administrative appeal for the Justice Department's immigration decisions. The Board of Immigration Appeals (B.I.A.), like the immigration judges, is located within the Executive Office for Immigration Review. The Board reviews almost all immigration judge decisions and some district director decisions. It is composed of five attorney members, all of whom normally participate in every case. It reviews cases *de novo* on the basis of the administrative record and publishes precedential opinions binding on the immigration judges and on the I.N.S.

Twenty-five other categories of district director decisions are appealable to the Associate Commissioner for Examinations, an I.N.S. policymaking official whose appellate jurisdiction has been subdelegated to the Administrative Appeals Unit (A.A.U.) In that unit, cases are decided *de novo* by individual non-attorney staff members and reviewed by the unit chief. The A.A.U. does not ordinarily publish its decisions.

ceipt of any such notice or other information or document has or should have any preclusive effect upon the federal government's ability to take enforcement action against the alleged violator.

The Justice Department's current regulations specify with a high degree of clarity which immigration decisions are administratively appealable and to which appellate body. However, reasons for the various assignments are not always evident.

The factors that should influence the choices of forum for administrative review of agency adjudication can be developed through a three-part methodology: (1) identify those attributes of the possible review forums that affect the accuracy, the efficiency, the acceptability, or the consistency of the administrative process; (2) identify the attributes of cases that favor the selection of a review forum with particular forum attributes; (3) determine the extent to which those case attributes tend to be present in the particular class of cases under consideration.

In Recommendation 75-3, the Administrative Conference set forth criteria to guide Congress in selecting the appropriate forum for judicial review of administrative agency action. Using the methodology described above, the present recommendation suggests some additional criteria and describes ways in which that expanded list of factors, with only slight modification, can be employed also to select a forum for administrative review. Applying those criteria, the recommendation then suggests forums for administrative review of various classes of immigration decisions.

RECOMMENDATION**A. Forum For Administrative Review**

1. The Justice Department should undertake a comprehensive review of its regulations governing the assignment of forums for administrative review of immigration orders. In examining the categories of Board of Immigration Appeals (B.I.A.) and Administrative Appeals Unit (A.A.U.) jurisdiction, the Justice Department should consider the following factors to the extent applicable.

a. Factors favoring selection of the B.I.A. for a particular class of cases include (i) high likelihood of a substantial impact on the litigants; (ii) the prevalence of issues of law or discretion, particularly when the public impact of a decision will be widespread; (iii) the desirability of providing for judicial review of the class of cases in the courts of appeals.

b. Factors favoring selection of the A.A.U. for a particular class of cases include (i) a high volume of cases; (ii)

the prevalence of questions of descriptive fact, rather than issues of law or discretion; (iii) high likelihood that administrative review will require the taking of additional evidence.

c. Once one class of cases is committed to a particular review forum, there is benefit in assigning to that same forum (i) other classes of cases tending to raise similar issues and (ii) other cases which, if sent elsewhere, would frequently result in the bifurcation of proceedings affecting the same individual.

d. With all else equal, the status quo should be preserved.

2. In revising its regulations, the Justice Department should make the following specific case assignments:

a. Appeals from orders of deportation and exclusion should continue to be heard by the B.I.A.

b. Appeals from orders rescinding adjustment of status should continue to be heard by the B.I.A.

3. The Justice Department should also, subject to the development of new information in the review recommended in paragraph 1, make the following case assignments:

a. All appeals from district directors' denials of visa petitions should be heard by the B.I.A.; thus orphan, fiance(e), and occupational petitions should be transferred from the A.A.U. to the B.I.A.

b. If administrative appeals from district directors' denials of waivers of the grounds of exclusion under section 212(c) of the Immigration and Nationality Act (applicable to aliens who are returning to a lawful unrelinquished domicile in the United States of seven years) are preserved,* they should continue to be heard by the B.I.A.

c. Appeals from district directors' denials of waivers under sections 212(h) and 212(i) of the Act (applicable to certain close relatives of American citizens and permanent residents) should be transferred from the A.A.U. to the B.I.A.

*A pending Justice Department proposal would eliminate administrative appeals from these orders. The issue of whether these orders should be administratively appealable is beyond the scope of this recommendation.

d. Appeals from district directors' denials of applications to waive the two-year foreign residence requirement for exchange visitors should be transferred from the A.A.U. to the B.I.A.

e. Appeals from denials of waivers under section 212(d)(3) of the Act (applicable to nonimmigrants) should be transferred from the B.I.A. to the A.A.U.

f. Appeals from district directors' denials of applications for permission to reapply for admission after exclusion or deportation should continue to be heard by the A.A.U.

B. Structure and Independence of the Board of Immigration Appeals

1. The B.I.A. should adopt a system of randomly selected three-member panels to decide cases. En banc review should be afforded, upon a determination by a majority of the B.I.A., only in the following circumstances: (a) When invoked by any B.I.A. member; (b) at the request of the I.N.S. Commissioner or the Attorney General following decision; or (c) when the aggrieved party petitions for review of a split panel decision.

2. If necessary to accommodate the case transfers recommended in part A above, the B.I.A.'s membership should be slightly increased.

3. Congress should enact legislation to give the B.I.A. statutory recognition. Under the legislation, the B.I.A. should remain within the Department of Justice. The statute should confer jurisdiction over deportation, exclusion and rescission orders, and should authorize the Attorney General to adjust the Board's jurisdiction as to other matters.

4. The Attorney General should retain the power to review individual B.I.A. decisions. In accordance with current practice, this power should be exercised only in extraordinary circumstances.

(50 FR 52894, Dec. 27, 1985)

§ 305.85-5 Procedures for Negotiating Proposed Regulations (Recommendation No. 85-5).

Negotiations among persons representing diverse interests have proven to be effective in some cases in developing proposals for

agency rules. In 1982, the Administrative Conference of the United States adopted Recommendation 82-4, 1 CFR § 305.82-4, encouraging the use of negotiated rulemaking by Federal agencies in appropriate situations.¹ The concept of negotiated rulemaking arose from dissatisfaction with the rulemaking process, which since the 1960's, in many agencies, had become increasingly adversarial and formalized—unlike the brief, expeditious notice and comment procedure envisioned in section 553 of the Administrative Procedure Act. Experience has now shown that negotiated rulemaking can be a practical technique in appropriate instances.

Since Recommendation 82-4 was adopted, its recommended procedures have been followed four times by Federal agencies. The Federal Aviation Administration used negotiated rulemaking to develop a new flight and duty time regulation for pilots. The Environmental Protection Agency used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions and on emergency exemptions from pesticide regulations. The Occupational Safety and Health Administration encouraged labor, public interest, and industry representatives to negotiate a standard for occupational exposure to benzene. The benzene negotiations did not result in agreement among the parties on a proposed rule, but the other three negotiations did lead to substantial agreement resulting in two final rules (which have thus far not been challenged) and one draft rule which, after public comment, is pending before the agency.

The experience of these four cases has shown that the original recommendation was basically sound, and has provided a basis for the Administrative Conference to use in supplementing Recommendation 82-4.

It is important to view Recommendation 82-4 and the present recommendation, taken together, as a guide to issues to be considered rather than a formula to be followed. Negotiation is intrinsically a fluid process that cannot be delineated in advance. Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by interested parties, past and current relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the represent-

atives, the number and divergence of views within each constituency represented, and the skill of the participants and mediators. These factors are mostly dynamic and their character is likely to change during the negotiating process. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate, how the negotiations should be conducted, or even the definition of "successful" negotiations.

Agencies undertaking negotiated rulemaking must be prepared to deal with these real world uncertainties by pursuing a thoughtfully flexible approach. Elements of Recommendation 82-4 and the present recommendation provide a conceptual framework within which to plan and conduct negotiations in a particular proceeding, but should not be taken as a formal model. An agency cannot merely transplant a pattern followed successfully by another agency, or even by itself on another occasion. Nevertheless, agencies that are considering negotiated rulemaking for the first time should find it helpful to discuss their plans with other agencies and persons experienced with the process.

Some agencies have indicated a concern about the effect of the Federal Advisory Committee Act on negotiated rulemaking proceedings. The four agency experiences reviewed by the Administrative Conference have not shown that the Act, as interpreted by the sponsoring agencies and participants, impeded effective negotiations. Under current judicial and agency interpretations of the Act, it appears that caucuses and other working group meetings may be held in private, where this is necessary to promote an effective exchange of views.

Another concern expressed by some agencies has been the potential costs associated with negotiated rulemaking. While aspects of the recommended process may entail some short-term additional costs, the Conference believe that potential long-range savings will more than offset the costs. Moreover, agencies should be aware of opportunities for assistance from within the government, for example, training provided by the Legal Education Institute of the Department of Justice, and mediation assistance by the Federal Mediation and Conciliation Service and the Community Relations Service.

RECOMMENDATION

1. An agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations. Agency participation can occur in various ways. The range of possibilities extends from full participation as a negotiator

¹Recommendation 82-4 used the term "regulatory negotiation" to refer to this process. The present recommendation substitutes "negotiated rulemaking" to emphasize that it is addressing negotiation of rules, and not other uses of negotiations in the regulatory process.

to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility.

2. Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency, and others involved in the negotiations, may need to communicate with other participants—perhaps with the assistance of a mediator or facilitator—to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible.

3. The agency should recognize that negotiations can be useful at several stages of rulemaking proceedings. For example, negotiating the terms of a final rule could be a useful procedure even after publication of a proposed rule. Usually, however, negotiations should be used to help develop a notice of proposed rulemaking, with negotiations to be resumed after comments on the notice are received, as contemplated by paragraphs 13 and 14 of Recommendation 82-4.

4. The agency should consider providing the parties with an opportunity to participate in a training session in negotiation skills just prior to the beginning of the negotiations.

5. The agency should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. In some cases, that person may need to have prior knowledge of the subject matter of the negotiations. The person chosen may be styled "mediator" or "facilitator,"

and may be, but need not be, the same person as the "convenor" identified in Recommendation 82-4. There may be specific proceedings, however, where party incentives to reach voluntary agreement are so strong that a mediator or facilitator is not necessary.

6. In some circumstances, Federal agencies such as the Federal Mediation and Conciliation Service or the Community Relations Service of the Department of Justice may be appropriate sources of mediators or facilitators. These agencies should consider making available a small number of staff members with mediation experience to assist in the conduct of negotiated rulemaking proceedings.

7. The agency, the mediator or facilitator, and, where appropriate, other participants in negotiated rulemaking should be prepared to address internal disagreements within a particular constituency. In some cases, it may be helpful to retain a special mediator or facilitator to assist in mediating issues internal to a constituency. The agency should consider the potential for internal constituency disagreements in choosing representatives, in planning for successful negotiations, and in selecting persons as mediators or facilitators. The agency should also recognize the possibility that a group viewed as a single constituency at the outset of negotiations may later become so divided as to suggest modification of the membership of the negotiating group.

8. Where appropriate, the agency, the mediator or facilitator, or the negotiating group should consider appointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. The parties would need to agree upon the protection to be given confidential data. A similar procedure may also be desirable in order to permit neutral technical advice to be given in connection with complex data.

9. Use of a "resource pool" may be desirable, to support travel, training, or other appropriate costs, either incurred by participants or expended on behalf of the negotiating group. The feasibility of creating such a pool from contributions by private sources and

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the agency should be considered in the pre-negotiation stages.

[50 FR 52895, Dec. 27, 1985]

PART 310—MISCELLANEOUS STATEMENTS

Sec.

310.1 Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization (Adopted May 7, 1971).

310.2 Statement of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act (Adopted June 7-8, 1973).

310.3 Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act.

310.4 Strengthening Regulatory Agency Management Through Seminars for Agency Officials.

310.5 Statement on Procedures to Deal with Emergency Shortages of Natural Gas.

310.6 Resolution Concerning Congressional Termination of Pending Administrative Proceedings at the Federal Trade Commission.

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310.8 Statement of the Administrative Conference on Discipline of Attorneys Practicing before Federal Agencies.

310.9 Statement on Guidelines for Choosing the Appropriate Level of Agency Policy Articulation.

310.10 Statement on Agency Use of an Exceptions Process to Formulate Policy.

310.11 Statement on Hearing Procedures for the Resolution of Scientific Issues.

AUTHORITY: 5 U.S.C. 571-576.

§ 310.1 Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization (Adopted May 7, 1971).

[38 FR 19794, July 23, 1973]

§ 310.2 Statement of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act (Adopted June 7-8, 1973).

[38 FR 16841, June 27, 1973, as amended at 39 FR 23045, June 26, 1974]

§ 310.3 Statement of the Administrative Conference on ABA Resolution No. 1 Proposing to Amend the Definition of "Rule" in the Administrative Procedure Act.¹

[39 FR 4849, Feb. 7, 1974]

§ 310.4 Strengthening Regulatory Agency Management Through Seminars for Agency Officials.

In pursuance of its continuing concern with the effective management of collegial regulatory agencies,² the Conference approves the following statement.

(a) In multimember regulatory agencies, the division of collegial responsibilities makes agency management unusually complex. The working relationships in a collegial setting involving chairmen, members, and top staff are unique in a number of respects. They are foreign to the dominant experience of many who find themselves involved in them. Previously learned ways of doing things must be undone and new knowledge forged from experience.

(b) The objectives of prior efforts to strengthen the managerial role of the chairmen of collegial agencies have largely been realized. Although the preeminence of chairmen in the management realm is generally established, there remains some ambiguity in their role in relation to the role of members. This condition frequently results in some underlying tension in chairman-member relationships. But differences are seldom openly articu-

¹For the original Conference action on this and other ABA Resolutions to amend the APA, see 1972-73 Report of the Administrative Conference of the United States, pp. 49-53; also reprinted at 38 FR 16839.

²See Views of the Administrative Conference on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization, adopted May 7, 1971.

lated and worked through. When differences arise, they are likely to appear in the context of particular issues, and not in a way that provokes attention to general questions about working relationships.

(c) Chairmen, though thrust into a more active managerial role than other agency members, sometimes seem unenthusiastic about management-related matters and have had limited preparation for this aspect of their responsibilities. Other agency members, who in a broad sense are ultimately charged with responsibility for management, likewise often appear to lack interest in management matters, such as setting regulatory priorities and resource allocations. As a result, there is little focused attention given at the top of the agencies to the larger management questions and particularly to the nature and viability of the processes through which major management determinations are made.

(d) Although differences among agencies must be recognized fully in treating problems of regulatory management, there are certain commonalities. Even if experiences are not always directly transferable, there will be positive effects that result from their exchange. Yet there has been very little systematic communication among the agencies, especially at the level of chairmen and commissioners.

(e) Well-planned and adeptly conducted seminars are uniquely suited to developing perspectives and understandings related to the roles of chairmen and members, stimulating interest in particular problem areas, suggesting approaches to problem-solving, and exchanging information about organizational performance. The value of such endeavors has been demonstrated through a number of programs aimed at groups of officials not unlike regulatory officials. New members of Congress participate in such enterprises. And the seminars regularly conducted for members of the Federal judiciary by the Federal Judicial Center are especially relevant. Regulatory agency performance thus should be improved by affording agency members the opportunity to participate in seminars at which they can exchange views with officials of other agencies

on management problems, alternative and innovative approaches to policy formulation, intra- and inter-agency and governmental relationships, and methods of dealing with the complex role questions presented when regulatory problems are administered in a collegial setting.

(f) In exercise of its statutory authority to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure," the Administrative Conference should arrange for the conduct of periodic seminars for regulatory agency officials. Participants should be drawn principally from among the chairmen, members, and senior staff of the independent regulatory agencies, and the agencies should cooperate in arranging their participation. In the seminars, special emphasis should be placed on the interests and needs of officials who are newly appointed to their positions. The seminars should deal with matters basic to agency performance, such as budget and personnel policies and procedures; priority setting; relationships with Congress, departments and agencies, and the Executive Office of the President; and the implications of the Administrative Procedure Act for the management of regulatory programs.

(g) The seminars should be scheduled at the discretion of the Chairman of the Administrative Conference. The participating agencies should play a role in planning the seminars, as should the U.S. Civil Service Commission. The seminar format should be flexible and should emphasize informal problem-oriented group discussion, with "expert" informational inputs as necessary, rather than formal presentations. Reliance should be placed on the participants themselves and on others experienced in the regulatory process, including former members and chairmen. Each seminar should be evaluated by the participants as an aid to improving subsequent efforts.

[40 FR 27928, July 2, 1975]

§ 310.5 Statement on Procedures to Deal with Emergency Shortages of Natural Gas.

[41 FR 56770, Dec. 30, 1976]

§ 310.6 Resolution Concerning Congressional Termination of Pending Administrative Proceedings at the Federal Trade Commission.

The Conference is aware of recent legislative proposals to terminate numerous ongoing rulemaking and adjudicative proceedings at the Federal Trade Commission. The Conference takes no position with regard to the merits of those proceedings. However, the Conference wishes to express its concern about the precedent which would be set by any premature legislative intervention in administrative proceedings. Such intervention precludes orderly development and consideration of the complex issues involved and undermines respect for the administrative process. Absent compelling circumstances or revision of the underlying substantive statute, Congressional termination of pending administrative proceedings is undesirable.

[45 FR 2310, Jan. 11, 1980]

§ 310.7 Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act.

The Administrative Conference has reviewed the major regulatory reform proposals pending in Congress: H.R. 746, the Regulatory Procedure Act of 1982, reported by the House Judiciary Committee on February 25, 1982, and S. 1080, the Regulatory Reform Act, passed by the Senate on March 24, 1982. These bills would substantially revise the provisions of the APA governing informal rulemaking, 5 U.S.C. 553. Our views on the following proposed revisions of section 553 are set forth below.

1. Notice of proposed rulemaking. The Conference believes the detailed notice requirements of amended section 553(b)(1)(F), in section 3 of the Senate bill, are unduly burdensome as general requirements in rulemaking.

The Conference recommends enactment of the provision in section 3 of

the Senate bill that would amend section 553 to require publication of a new notice of proposed rulemaking and an opportunity for comment thereon, whenever the provisions of the rule the agency plans to adopt are so different from the provisions of the original proposal that the initial notice no longer fairly apprises the public of the issues ultimately to be resolved in the rulemaking.

2. Opportunity to present comments. The Conference has no objection to enactment of the provisions in the House and Senate bills that would establish a minimum comment period in rulemaking under section 553, provided that the "good cause" exception in section 553(b) is retained.

The Conference recommends that an opportunity for oral presentation of data and views should not be a mandatory requirement in rulemaking under section 553 even if the requirement is limited, as in the Senate and House bills, to "major" rulemakings. The Conference has recommended, in Recommendation 76-3, that in appropriate circumstances agencies should utilize oral presentations in informal rulemaking, but agencies should have discretion to decide when and to whom the presentations are made.

3. Cross-examination. The Conference recommends that Congress not enact the provisions in the Senate and House bills that would require cross-examination to be permitted in rulemaking under section 553, even though the bills would only require use of cross-examination as a "last resort" procedure. The Conference has previously recommended, in Recommendation 76-3, that agencies should give interested persons an opportunity to indicate issues of specific fact for which they contend cross-examination is appropriate, and that if cross-examination is permitted, it should be strictly limited as to subject and duration.

4. The requirement of a rulemaking file. The Conference recommends that Congress amend the APA to provide that, in rulemaking under section 553, an agency shall maintain a public rulemaking file beginning no later than the date on which the notice of proposed rulemaking is published. At a minimum, the agency should be re-

quired to place in the public rulemaking file, promptly upon receipt or production, the following materials: (1) All notices pertaining to the rulemaking, (2) copies, or where impractical a reference to or index of, all factual material upon which the agency substantially relied in formulating the proposed or final rule, unless the material is by law exempt from disclosure, (3) all written comments submitted by interested persons during the rulemaking, and (4) any other material required by statute or agency rule to be made public in connection with the rulemaking.

5. *Opportunity to comment on material in the rulemaking file.* The Senate bill provides that an agency may not substantially rely upon factual material that was not placed in the rulemaking file in time to afford the public an adequate opportunity to comment on the material. The Conference opposes enactment of a statutory provision to this effect because the practical effect of such an inflexible requirement would be to encourage nonsubstantive challenges to final agency rules. The Conference, however, does reaffirm the principle, stated in Recommendation 76-3, that agencies provide an appropriately limited additional opportunity to comment when material placed in the rulemaking file, including comments filed in the proceeding, presents new and important issues or serious conflicts of data.

6. *Statement of basis and purpose.* The Conference recommends enactment of the provisions in the House and Senate bills that would amend section 553 to add a requirement that the statement of basis and purpose accompanying a final agency rule include a response to all significant issues raised in the public comments received by the agency during the comment period established for the rulemaking.

[47 FR 30715, July 15, 1982]

§ 310.8 Statement of the Administrative Conference on Discipline of Attorneys Practicing Before Federal Agencies.

Because of the controversy regarding actions by the Securities and Exchange Commission, through administrative rather than court proceedings, to discipline attorneys whose services

were used in transactions that the Commission believes violate the securities laws, the Administrative Conference undertook a study of procedures and concerns of Federal departments and agencies in disciplining attorneys practicing before them. The Conference concludes that any current problems arising from the discipline of attorneys by Federal agencies are not of such magnitude or so widespread as to require legislative action or the adoption of uniform Federal standards.

[47 FR 58210, Dec. 30, 1982]

§ 310.9 Statement on Guidelines for Choosing the Appropriate Level of Agency Policy Articulation.

The Administrative Conference continues to support the general principle, stated in Recommendation 71-3, that "agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible." Without endorsing every particular conclusion expressed therein, the Conference believes that the appended statement of its Committee on Judicial Review and the supporting report of its consultant suggesting considerations and guidelines for choosing the appropriate level of agency policy articulation will assist agencies in achieving these ends.

EDITORIAL NOTE: The appendix is omitted pursuant to § 304.2(a) of this chapter. It may be found in the FEDERAL REGISTER.

[48 FR 31181, July 7, 1983]

§ 310.10 Statement on Agency Use of an Exceptions Process to Formulate Policy.

The Administrative Conference commissioned a study¹ of the Department of Energy's petroleum allocation and entitlements program as administered through an "exceptions" process by the Office of Hearing and Appeals.

¹ "When the Exception Becomes the Rule: Regulatory Equity, the Exceptions Process and the Formulation of Energy Policy" by Peter H. Schuck (1983). While not endorsing every statement and conclusion expressed in the report, the Conference commends the report for its value in examining a significant exceptions program during periods of difficulty.

The program covered by the study applied to the petroleum industry from 1973 to 1981, a period characterized by rapidly changing conditions in the industry and several periods of emergency.

The Conference believes that the experiences of this particular "exceptions" process, while unique to this program in important respects, are worth sharing with the Congress and with those agencies that may administer a regulatory program—especially in the context of an emergency—in which individuals or classes seek waivers, exemptions, variances, or other particularized exceptions to rules of general applicability.²

THE REGULATORY FRAMEWORK

The petroleum industry began to come under comprehensive Federal regulation in 1970 with the advent of anti-inflation controls. In the Emergency Petroleum Allocation Act of 1973 Congress mandated a program of price and allocation controls to be administered by an energy agency, ultimately the Department of Energy (DOE).

Under this program, the energy agency issued rules prescribing distributional patterns and prices for petroleum products among producers, refiners, distributors, and end users. To deal with inequities created by the regulatory program, a "safety valve" process was established to grant exceptions in cases where individual firms suffered disproportionately. The exceptions office, ultimately called the Office of Hearings and Appeals (OHA), quickly became an important locus of power within DOE. OHA was kept separate and autonomous from the Economic Regulatory Administration (ERA), the rulemaking and enforcement arm of the Department.

The Office of Hearings and Appeals had the authority to issue exceptions to regulations, special redress orders, modification and rescission orders, and stays of pending orders. OHA could order any firm to sell or buy crude oil or refined products from any other firm in the industry under terms prescribed by OHA. These powers were exercised subject to the approval of a Departmental administrative review committee, and, if consensus was not reached, to the possibility of Secretarial review. The process was heavily influenced by OHA's leverage and expertise.

ACHIEVEMENTS AND PROBLEMS

Four detailed case studies were made of the operation of OHA: the subsidization of small refiners during 1974-1981, the handling of disparities caused by the Iranian oil embargo in 1979, the pricing of Alaska crude oil, and the motor gasoline crisis of 1979. Each of these cases has its own peculiar context and history; as a whole they defy easy summarization. It seems undeniable, however, that as energy regulation became increasingly controversial in the 1970's, DOE policymakers—on matters of considerable importance—often deferred to the judgment and actions of OHA.

That office gradually was transformed from a mere safety valve dispensing equitable exceptions to individual firms caught up in over-broad rules into an important policymaking body within DOE, designing many of the substantive specifications for the very regulatory system whose pressures OHA was supposed to relieve.

OHA's achievements during the period of controls were impressive. OHA was able to process a large caseload and to decide important cases quickly. OHA decisions were generally regarded as being of high professional and intellectual quality. OHA was able to provide immediate relief when it appeared that delay would be tantamount to denial.

Nevertheless, problems began to crop up, especially as procedures designed for emergency relief became instruments for broad gauged policymaking.

²The Conference expresses its views here in a "statement" rather than the more forceful "recommendation" format because the program that was studied in detail is currently winding down, and because the data compiled on the exceptions processes of other agencies is not sufficient to support a recommendation of universal applicability.

INDETERMINATE EQUITABLE STANDARDS. Energy legislation has always prescribed three standards: relief must be necessary to prevent "special hardship," "inequity," or "unfair distribution of burdens." OHA elaborated these extremely ambiguous standards on a case-by-case basis; OHA's published guidelines sometimes provided little assistance as to the meanings of the standards.

INFORMAL PROCEDURES. Neither the DOE Act nor the Administrative Procedure Act prescribes OHA's procedure in exceptions cases. The procedures devised by OHA were highly informal, combining elements of notice-and-comment rulemaking with an opportunity for a relatively summary adjudicative hearing. The courts were highly deferential to OHA's choice of procedures, citing the "emergency" nature of the program, even during periods when no actual emergency existed. The flexibility and informality that permitted expedition also occasioned criticism from regulatory participants who complained about lack of sufficient notice, and about inadequate procedures for discovery, hearings, and review and also made claims of unfair ex parte communications and combination of functions.

THE "SAFETY VALVE" MENTALITY. By all accounts, DOE's rulemaking arm, the ERA, on many occasions deferred to OHA on fundamental policy problems that ought to have been confronted and resolved through a legislative-type process. Despite OHA's efforts to open its significant proceedings to public comment and to broaden the policy focus of the proceedings, the case-by-case exceptions procedure was not well-suited to development of sound policy and generally applicable rules. By its nature an exceptions process tends to examine anomalies and emergencies rather than typical situations. OHA's analytical focus was on hardships of individual firms rather than upon the effects that particular decisions could have on the industry as a whole or on consumers generally.

INTERIM RELIEF. OHA often found it necessary to provide expedited relief to applicants after only a summary hearing and before issuing a proposed

final decision for public comment. Relief was undoubtedly sometimes necessary to prevent irreparable harm due to delay, but reliance on interim decisions by those in the market led to adjustments and created new equities that made retractions difficult and possibly unjust.

LESSONS

It is difficult fully and fairly to evaluate OHA's performance and the role of the exceptions process without taking into consideration two crucial factors: the comparative weakness of the DOE rulemaking process and the enormous problems associated with any program designed to regulate the entire petroleum industry. Nor are the insights gleaned in this study necessarily transferable to other programs in other agencies. Because many of the issues raised by DEO's exception process are endemic to broad regulatory programs, however, the Conference offers, to the extent they may be helpful, the following suggestions as an aid to congressional oversight and agency self evaluation.

1. **EXCESSIVE USE OF EXCEPTIONS.** Agencies should guard against the temptation to avoid necessary rulemaking, including the reconsideration of existing rules, through excessive reliance upon an exceptions process.

2. **EMERGENCY PROGRAMS.** Where an exceptions process begins as part of an emergency program, consideration should periodically be given to whether the emergency is continuing. Abbreviated agency procedures and extraordinarily deferential judicial review—which may be appropriate for an emergency—should be replaced by conventional agency and judicial standards of conduct when the emergency is over.

3. **EQUITABLE CRITERIA.** In some circumstances, explicit congressional prescription of the equitable or other criteria that shall govern an exceptions process would be helpful. Agencies should consider the issuance of regulations further defining those criteria and prescribing the procedures to be used in exceptions proceedings.

4. **PROCEDURES TAILORED TO EQUITIES.** Procedures governing exceptions cases

should reflect the need for particularized regulatory equity in the applicable program. The procedures provided for relatively routine "hardship" applications and for those cases of broader policy significance should differ to take account of the differing demands for information, fairness, and legitimacy. To the extent feasible in light of the need for speedy action, adequate notice of an application for exceptions relief should be given to all interested members of the public, and relief should be granted or denied only after an opportunity for full development of the relevant factual and policy issues.

5. **EMERGENCY RELIEF.** Where an exceptions program allows for emergency, interim relief, an agency should consider the inclusion of suitable mechanisms—such as an escrow fund, interest obligation, or expiration date for interim order—to restore the *status quo ante* insofar as possible in the event that such relief is subsequently determined to be inappropriate.

6. **EXCEPTIONS TRIBUNAL.** The form and independence of the tribunal that is to decide exceptions cases should depend chiefly upon the policy significance of the exceptions decision and the value of exceptions relief to applicants. The greater the precedential and policy significance of an exceptions decision, the more closely the tribunal should be integrated into the policy-sensitive and politically-accountable decision processes of the agency. The more the exceptions decision is routine, without precedential significance, and purely equitable or "hardship" in nature, the more readily it may be delegated to decision processes that are more autonomous and adjudicatory in character.

7. **SIGNIFICANT CASES.** If an exceptions tribunal decides a case with broad policy significance, the proceeding should be conducted much as a rule-making with broadened participation in the exceptions adjudication and with an opportunity for public comments on all significant policy, factual, and remedial issues in the case.

[48 FR 57464, Dec. 30, 1983]

§ 310.11 Statement on hearing procedures for the resolution of scientific issues.

The development of effective decisionmaking techniques for the evaluation of scientific studies has been one of the most elusive problems for the administrative process. The implementation of health and safety laws often requires an evaluation of the scientific reliability of laboratory animal, clinical, or epidemiological test data, a determination of risks and benefits based upon those data and other factors, and a final "regulatory conclusion" in which the relevant law is applied in light of the previous conclusions. For example, health and safety agencies commonly are required to determine whether a particular chemical is carcinogenic or otherwise harmful as a prerequisite to reaching a regulatory conclusion.

The quality and legitimacy of these agency decisions can be improved by counseling with eminent scientific experts outside of the agency. Some scientists and others have supported the idea of a "science court" or an institution to which administrative agencies could refer scientific disputes for resolution by expert scientists. In response, agencies have developed several methods of obtaining scientific input, including the use of advisory committees. Science advisory committees are the most common method used to obtain such assistance before an agency reaches a decision. In addition, the Food and Drug Administration (FDA) has created and used twice a unique procedure, the Public Board of Inquiry (PBOI), to obtain independent scientific review of particular regulatory decisions. The PBOI combines the elements of a "scientific hearing" with the more typical "adversarial hearing" approach for the evaluation of scientific evidence.

The PBOI is one of three alternative informal methods of proceeding that FDA offers applicants in lieu of the formal adjudication by an administrative law judge (ALJ) that would otherwise be held to review certain decisions concerning the approval of food additives and new drugs. The other two alternatives are a hearing before an advisory committee or an informal

hearing before the Commissioner of FDA. The PBOI consists of a panel of three scientists appointed by the Commissioner. Two of the three scientists are selected from recommendations of the parties. The Board obtains scientific "testimony" within an informal quasi-adjudicative hearing framework, in which the advocacy role of lawyers is minimized in favor of a "scientific forum" approach—although the Board's decision is an "initial decision" and has the same legal status as an initial decision of an ALJ.

FDA's two PBOI hearings occurred in 1980 and 1983. In the first, a PBOI was convened to determine whether Aspartame, now a widely used artificial sweetener, should be approved as a food additive. In the 1983 proceeding, a PBOI was convened to determine whether Depo Provera, a drug approved in other countries as a contraceptive, should be approved for that use in the United States.

Some analysts contend that FDA's experiences confirm the validity of the "science court" idea for the evaluation of scientific evidence. They argue that techniques like the PBOI are more effective for obtaining scientific advice than traditional adversarial hearings because a PBOI provides the presiding scientists with the flexibility to operate according to procedures that are customary in scientific inquiry. Others suggest that the PBOI costs too much for the value of the opinions obtained from it. A study commissioned by the Conference, however, suggests that the costs or delays of the two PBOI proceedings were significantly enlarged by unanticipated management problems that can be remedied.

The Administrative Conference suggests that continued experimentation with alternative types of hearing procedures for the resolution of scientific

issues is justified. Improvements are needed in management of such procedures to make them more efficient and more accurate. Examples include:

(1) Appointing the chairperson at the start of the hearing process;

(2) Providing additional administrative support for board members;

(3) Separating, to the extent possible, the matters of scientific inquiry from any policy issues that may be addressed concerning the ultimate legal or regulatory actions that the agency ought to take;

(4) Encouraging boards to utilize an experienced employee as a management adviser in the conduct of the process;

(5) Providing an improved opportunity for direct communication between the board and the agency head upon submission of the board's decision;

(6) Urging boards to adhere to procedures intended to ensure that the administrative record is complete and usable for successive stages of the administrative and legal process; and

(7) Urging persons conducting agency scientific hearings in significant cases to identify the bases for their conclusions.

Other agencies with regulatory programs that depend on scientific determinations should consider experimental use of a process similar to the PBOI as a voluntary alternative to a hearing that would otherwise be held to resolve issues of scientific uncertainty. Examples of other agencies that may have similar needs and objectives include the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration.

[50 FR 52896, Dec. 27, 1985]

CHAPTER IV—MISCELLANEOUS AGENCIES

EDITORIAL NOTE: Federal agencies are required to publish regulations implementing the provisions of the Freedom of Information Act (5 U.S.C. 552(a)), the Privacy Act of 1974 (Pub. L. 93-579, 5 U.S.C. 552a), and the Government in the Sunshine Act (Pub. L. 94-409, 5 U.S.C. 552b). While most agencies have existing chapter assignments in the Code of Federal Regulations, a few agencies do not. Since certain of these agencies are unlikely to be issuing regulations other than those relating to the acts mentioned above, the Director of the Office of the Federal Register has grouped these miscellaneous agencies into this chapter as an efficient means of administering the CFR system.

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PART 425—PRESIDENT'S COMMISSION ON WHITE HOUSE FELLOWSHIPS

Sec.

425.1 Purpose and scope.

425.2 Procedures for notification of existence of records pertaining to individuals.

425.3 Procedure for requests for access to or disclosure of records pertaining to individuals.

425.4 Correction of records.

425.5 Disclosure of records to agencies or persons other than the individual to whom the record pertains.

AUTHORITY: 5 U.S.C. 552a(f).

SOURCE: 40 FR 52416, Nov. 10, 1975; 40 FR 56651, Dec. 4, 1975, unless otherwise noted.

§ 425.1 Purpose and scope.

This part sets forth the President's Commission on White House Fellowships procedures under the Privacy Act of 1974 as required by 5 U.S.C. 552a(f). Information to applicants regarding the implementation of this Act is contained in the White House Fellowships Application Instructions.

§ 425.2 Procedures for notification of existence of records pertaining to individuals.

(a) The system of records, as defined in the Privacy Act of 1974, maintained by the President's Commission on White House Fellowships is listed annually in the *FEDERAL REGISTER* as required by that Act. Any person who wishes to know whether a system of records contains a record pertaining to him or her may either appear in person at Room 1308, 1900 E Street, NW., on work days between the hours of 8:30 a.m. and 5 p.m. or may write to the President's Commission on White House Fellowships Administrative Officer, Washington, D.C. 20415 (Phone 202-382-4661). It is recommended that requests be made in writing.

(b) Requests for notification of the existence of a record should state, if the requester is other than the individual to whom the record pertains, the relationship of the requester to that individual. (Note that requests will not be honored by the Commission pursuant to the Privacy Act unless made: (1) By the individual to whom the record pertains or (2) by

such individual's legal guardian if the individual has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction.)

(c) The Commission will acknowledge requests for the existence of records within 10 working days from the time it receives the request and will normally notify the requester of the existence or non-existence of records within 30 working days from receipt of request.

(d) No special identity verification is required for individuals who wish to know whether a specific system of records pertains to them.

[40 FR 52416, Nov. 10, 1975; 40 FR 56651, Dec. 4, 1975, as amended at 40 FR 59187, Dec. 22, 1975]

§ 425.3 Procedure for requests for access to or disclosure of records pertaining to individuals.

(a) Any person may request review of records pertaining to him by appearing at Room 1308, 1900 E Street, NW., Washington, D.C. on work days between the hours of 8:30 a.m. and 5 p.m. or by writing to the Commission on White House Fellowships Administrative Officer, Washington, D.C. 20415. (See paragraph (b) of this section for identification requirements.) The Commission will strive either to make the record available within 15 working days of the request or to inform the requester of the need for additional identification.

(b) In the case of persons making requests by appearing at the Commission, reasonable identification such as employment identification cards, drivers licenses, or credit cards will normally be accepted as sufficient evidence of identity in the absence of any indications to the contrary.

(c) Charges for copies of records will be at the rate of \$0.10 per photocopy of each page. No charge will be made unless the charge as computed above would exceed \$3 for each request or related series of requests. If a fee in excess of \$25 would be required, the requester shall be notified and the fee must be tendered before the records will be copied. Remittances shall be in the form either of a personal check or

bank draft drawn on a bank in the United States, or a money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed or delivered to the Administrative Officer, President's Commission on White House Fellowships, 1900 E Street, NW., Washington, D.C. 20415.

(d) Individuals will not be denied access to records pertaining to them.

[40 FR 52416, Nov. 10, 1975; 40 FR 56651, Dec. 4, 1975, as amended at 40 FR 59187, Dec. 22, 1975]

§ 425.4 Correction of records.

(a) An individual may request that a record or records pertaining to him or her be amended or corrected. Such requests shall be submitted in writing to the Administrative Officer at the Commission's business address.

(b) The signature of the requester will be sufficient identification for requesting correction of records.

(c) A request for amendment shall contain an exact description of the item or items sought to be amended and specific reasons for the requested amendment, as well as the individual's birthdate for purposes of verification of records.

(d) Within 10 working days after receipt of a request to amend a record, the Administrative Officer shall transmit to the requester a written acknowledgement of receipt of request. No acknowledgement is required if the request can be reviewed and processed with notification to the individual of compliance or denial within the ten-day period. Requester will be notified within 30 days whether or not his or her request has been granted.

(e) If the Administrative Officer determines that the requested amendment is appropriate to insure that the record is:

(1) Relevant and necessary to accomplish the purposes for which the records were collected; and

(2) As accurate, timely, and complete as are reasonably necessary to assure fairness to the requester, the Administrative Officer shall:

(i) Change the record accordingly;

(ii) Advise the requester that the change has been made, thirty days from receipt of written request;

(iii) After an accounting of disclosures has been kept pursuant to 5 U.S.C. 552a(c), advise all previous recipients of the record, who, the Commission believes, still retain a copy thereof, of the fact that the amendment was made and the substance of the amendment.

(f) If, after review of the record, the Administrative Officer determines that the requested amendment is not in conformity with the requirements of the Act, he shall:

(1) Advise the requester in writing within thirty days of written request of such determination together with specific reasons therefor; and

(2) Inform the requester that further review of the request by the Director of the Commission is available if a written request therefor is made within 30 days after date of denial.

(g) Within 30 working days of receipt of a written request for review pursuant to § 425.4(f)(2) the Director shall make an independent review of the record, using the criteria of § 425.4(e)(1) and (2).

(1) If the Director determines that the record should be amended in accordance with the request, the Administrative Officer shall take the actions listed in § 425.4(e)(2) (i), (ii), and (iii).

(2) If the Director, after independent review, determines that the record should not be amended in accordance with the request, the Administrative Officer shall advise the requester:

(i) Of the determination and the reasons therefor;

(ii) Of his or her right to file with the Administrative Officer a concise statement of his or her reasons for disagreeing with the refusal to amend the record;

(iii) That the record will be annotated to indicate to anyone subsequently having access to it that a statement of disagreement has been filed, and that the statement will be made available to anyone to whom the record is disclosed;

(iv) That the Director and the Administrative Officer may, in their discretion, include a brief summary of their reasons for refusing to amend the record whenever such disclosure is made;

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(v) That any prior recipients of this disputed record, who, the Commission believes, still retain a copy thereof, will be sent a copy of the statement of disagreement, after an accounting of disclosures has been kept pursuant to 5 U.S.C. 552a(c);

(vi) Of his or her right to seek judicial review of the refusal to amend the record, pursuant to 5 U.S.C. 552a(g)(1)(A).

[40 FR 59187, Dec. 22, 1975]

§ 425.5 Disclosure of records to agencies or persons other than the individual to whom the record pertains.

Records subject to the Privacy Act that are requested by any person other than the individual to whom they pertain will not be made available except under the following circumstances:

(a) Records may be circulated to appropriate officials incident to placing Fellows in work assignments for the Fellowship year.

(b) An accounting of the date, nature, and purpose of each disclosure of a record as well as the name and address of the person and agency to whom the disclosure was made will be indicated on the record. This accounting is available to the individual to whom the records pertain on written request to the Commission.

[40 FR 52416, Nov. 10, 1975; 40 FR 56651, Dec. 4, 1975, as amended at 40 FR 59187, Dec. 22, 1975]

PART 455—NATIONAL CAPITAL PLANNING COMMISSION (PRIVACY ACT REGULATIONS)

Sec.

455.1 Purpose and scope.

455.2 Definitions.

455.3 Procedures for requests pertaining to individual records in a record system.

455.4 Times, places, and requirements for identification of individuals making requests.

455.5 Disclosure of requested information to individuals.

455.6 Request for correction or amendment to the record.

455.7 Agency review of request for correction or amendment of the record.

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455.8 Appeal of an initial adverse agency determination on correction or amendment of the record.

455.9 Disclosure of record to a person other than the individual to whom the record pertains.

455.10 Fees.

455.11 Penalties.

455.12 Exemptions.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 42 FR 7921, Feb. 8, 1977, unless otherwise noted.

§ 455.1 Purpose and scope.

These procedures provide the means by which individuals may safeguard their privacy by obtaining access to, and requesting amendments or corrections in, information, if any, about these individuals which is under the control of the National Capital Planning Commission (hereafter, the "Commission").

§ 455.2 Definitions.

For the purpose of these procedures:

(a) The term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(b) The term "maintain" includes maintain, collect, use, or disseminate;

(c) The term "record" means any item, collection or grouping of information about an individual that is maintained by the Commission, including, but not limited to, his or her payroll information and mailing address and that contains his or her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as social security number;

(d) The term "system of records" means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual; and

(e) The term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

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§ 455.3 Procedures for requests pertaining to individual records in a record system.

(a) An individual who wishes to know whether a system of records maintained by the Commission contains a record pertaining to him or her shall submit a written request to that effect to the appropriate System Manager at the Commission. The System Manager shall, within 10 days of the receipt of such submission, inform the individual whether a system of records maintained by the Commission contains such a record.

(b) An individual who desires access to any identified record shall file a request therefor, addressed to the System Manager indicating whether such individual intends to appear in person at the Commission's offices or whether he or she desires to receive a copy of any identified record through the mail.

§ 455.4 Times, places, and requirements for identification of individuals making requests.

(a) An individual who, in accord with § 455.3(b) of this part indicated that he or she would appear personally shall do so at the Commission's offices, 1325 G Street NW., Washington, D.C., between the hours of 8:30 A.M. and 5:00 P.M., Monday through Friday (legal holidays excluded) and present a form of identification, such as a valid driver's license or employee identification card, which will permit the System Manager to verify that the individual is the same individual as contained in the record requested.

(b) An individual who, in accord with § 455.3(b) of this part indicated that he or she desired mail delivery of a copy of the record shall include in the request the date and location of birth of the individual as suitable proof of identity.

(c) Where the above mentioned forms of identification are not feasible or appropriate, the Commission shall request a signed statement from the individual asserting his or her identity and stipulating that the individual understands that knowingly or willfully seeking or obtaining access to records about another individual under false

pretenses is punishable by a fine of up to \$5,000.

§ 455.5 Disclosure of requested information to individuals.

Upon verification of identity, the System Manager shall disclose to the individual: (a) The information contained in the record which pertains to that individual; and (b) the accounting of disclosures of the record, if any, required by 5 U.S.C. 552a(c).

§ 455.6 Request for correction or amendment to the record.

An individual may request that a record pertaining to him or her be amended or corrected. The individual shall submit any such request in accord with § 455.3 of this part and shall state therein the item sought to be amended and specific reasons therefor.

§ 455.7 Agency review of request for correction or amendment of the record.

Within ten days of the receipt of the request to correct or to amend the record, the System Manager will acknowledge in writing such receipt and promptly either: (a) Make any correction or amendment of any portion thereof which the individual believes is not accurate, relevant, timely, or complete and inform the individual of same; or (b) inform the individual of his or her refusal to correct or to amend the record in accordance with the request, the reason for the refusal, and the procedures established by the Commission for the individual to request a review of that refusal.

§ 455.8 Appeal of an initial adverse agency determination on correction or amendment of the record.

An individual who disagrees with the refusal of the System Manager to correct or to amend his or her record may submit a request for a review of such refusal to the Chairman of the Commission, 1325 G Street NW., Washington, D.C. 20576. The Chairman will, not later than thirty days from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the Chairman ex-

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tends such thirty day period. If, after his or her review, the Chairman also refuses to correct or to amend the record in accordance with the request, the individual may file with the Commission a concise statement setting forth the reasons for his or her disagreement with the refusal of the Commission and may seek judicial review of the Chairman's determination under 5 U.S.C. 552a(g)(1)(A).

§ 455.9 Disclosure of record to a person other than the individual to whom the record pertains.

An individual to whom a record is to be disclosed in person may have a person of his or her own choosing accompany the individual when the record is disclosed.

§ 455.10 Fees.

(a) The Commission will not charge an individual for the costs of making a search for a record or the costs of reviewing the record. When the Commission makes a copy of a record as a necessary part of the process of disclosing the record to an individual, the Commission will not charge the individual for the cost of making that copy.

(b) If an individual requests the Commission to furnish him or her with a copy of the record (when a copy has not otherwise been made as a necessary part of the process of disclosing the record to the individual), the Commission will charge a fee of \$0.25 per page (maximum per page dimension of 8½×13 inches) to the extent that the request exceeds \$5.00 in cost to the Commission. Requests not exceeding \$5.00 in cost to the Commission will be met without cost to the requester.

§ 455.11 Penalties.

Title 18 U.S.C. 1001, Crimes and Criminal Procedures, makes it a criminal offense, subject to a maximum fine of \$10,000 or imprisonment for not more than five years or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States. Section 552a(i)(3) of the Privacy Act (5 U.S.C. 552a(i)(3)), makes it a misdemeanor,

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subject to a maximum fine of \$5,000, to knowingly and willfully request or obtain any record concerning an individual under false pretenses. Section 552a(i) (1) and (2) of the Privacy Act (5 U.S.C. 552a(i) (1) and (2)) provide penalties for violations by agency employees of the Privacy Act or regulations established thereunder.

§ 455.12 Exemptions.

No Commission records system is exempted from the provisions of 5 U.S.C. 552a as permitted under certain conditions by 5 U.S.C. 552a (j) and (k).

PART 456—NATIONAL CAPITAL PLANNING COMMISSION (FREEDOM OF INFORMATION ACT REGULATIONS)

Sec.

456.1 Introduction.

456.2 Organization.

456.3 Public access to information.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 47 FR 44229, Oct. 7, 1982, unless otherwise noted.

§ 456.1 Introduction.

The following regulations implement the Freedom of Information Act, as amended, 5 U.S.C. 552 (hereinafter the "Act"), and provide procedures by which information may be obtained from the National Capital Planning Commission (hereinafter the "Commission"). Official records made available pursuant to the Act shall be furnished to members of the public as prescribed herein.

§ 456.2 Organization.

The Commission is the central planning agency for the Federal Government in the National Capital. The Commission is composed of ex-officio, the Secretary of the Interior, the Secretary of Defense, the Administrator of the General Services Administration, the Mayor of the District of Columbia, the Chairman of the Council of the District of Columbia, and the Chairman of the Committees on the District of Columbia of the Senate and the House of Representatives, or their alternates; and five citizens, three of whom are appointed by the President,

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and two of whom are appointed by the Mayor of the District of Columbia. The Commission is assisted by a staff headed by an Executive Director. The staff is organized functionally as follows:

- (a) Office of the Executive Director;
- (b) Legal and Secretariat Services Section;
- (c) Management Services Section;
- (d) Planning and Programming Division;
- (e) Review and Implementation Division; and
- (f) Planning Services Division.

§ 456.3 Public access to information.

(a) *General policy.* It is the Commission's general policy to facilitate the broadest possible availability and dissemination of information to the public. The Commission's staff is available to assist the public in obtaining information formally by using the procedures herein or informally by discussions with the staff. The Commission's staff may, therefore, continue to furnish informally to the public information, which, prior to the amendments to the Act contained in Public Law 93-502, enacted November 21, 1974, was customarily furnished in the regular performance of their duties, provided the staff do so in a manner not inconsistent with these regulations. In addition, to the extent permitted by other laws, the Commission will make available records which it is authorized to withhold under the Act when it determines that such disclosure is in the public interest.

(b) *Established place of obtaining information.* Information may be obtained only from the Commission's offices, which are located at 1325 G Street, NW., Washington, D.C. 20576. Its official hours are 8:00 a.m. to 6:00 p.m., Monday through Friday, excluding legal holidays.

(c) *Information sources within the Commission.* Requests for Commission publications, offered for sale or informal requests for general information on the Commission should be directed to the Public Affairs Officer. All formal requests for agency records pursuant to the Act must be directed to the Commission's Records Management Officer.

Any request directed initially to the wrong information source will be correctly routed by the Commission's staff and the requesting party will be so notified. The ten-day time period within which the Commission is required to determine whether to comply with a request shall not begin to run until the request reaches, or with the exercise of due diligence should have reached, the appropriate information source.

(d) *Information routinely available.* The following types of information shall be routinely available (subject to the fee schedule, *infra*) for public dissemination without recourse to the Commission's formal information request procedures unless such information falls within one of the exemptions to agency disclosure listed in 5 U.S.C. 552(b):

- (1) Correspondence between the Commission and the public;
- (2) Executive Director's Recommendations;
- (3) Committee Reports;
- (4) Commission Memorandums of Actions; and
- (5) Maps.

Requests for information, other than maps, shall be directed to the Commission's Records Management Officer; map requests shall be directed to the Public Affairs Officer.

(e) *Formal requests for information.* All formal requests for information pursuant to the Act shall be made in writing to the Commission's Records Management Officer. To expedite internal handling of such requests, the words "Freedom of Information Request" shall appear on the face of the envelope bearing such request. The request shall state that the request is made pursuant to the Freedom of Information Act; shall reasonably describe the information sought, including the date the Commission received or produced the requested information, if known; shall state, pursuant to the fee schedule set forth *infra*, the maximum fee the party making the request would be willing to pay for the duplication of the requested records without further approval; and shall, if possible, provide a telephone number at which the requesting party can be

contacted to facilitate handling of the request.

(f) *Commission response to formal requests.* The Commission's Records Management Officer, upon request for information made in compliance with these regulations, shall determine within ten days (excepting Saturdays, Sundays, and legal holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor and of the right of such person to appeal to the head of the agency any adverse determination. In unusual circumstances as specified infra, the ten-day time limit may be extended by written notice to the person making the request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this paragraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from establishments that are separate from the Commission's offices;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(g) *Determination to grant request.* If the Commission's Records Management Officer makes a determination to grant a request in whole or in part, the person making such request will be so notified in writing. The notice shall also include a description of the information to be made available, a statement of the time when and the place where such information may be inspected or alternatively, the procedure for duplication and delivery (by

mail or other means) of the information to the requesting party and a statement of the total fees chargeable to the requesting person pursuant to the fee schedule infra.

(h) *Determination to deny request—appeal procedure.* If the Commission's Records Management Officer makes a determination to deny, in whole or in part, a request for information, he shall so notify the party making the request in writing. Any appeal of such determination shall be made in writing to the Chairman of the Commission and shall include a brief statement of the legal, factual, or other basis for the party's objection to the initial decision. The Chairman shall, within twenty days (excepting Saturdays, Sundays, and legal holidays) of the receipt of any such appeal determine whether to grant or deny the appeal and shall, immediately upon making his decision, give written notice of the decision to the party, including a brief statement of the reasons therefor.

(i) *Waiver.* Whenever a waiver of any of the procedures set forth herein would further the purpose of the Act by causing the public disclosure of non-confidential information within the time period required by the Act, the Commission's Records Management Officer may, in the context of individual requests for information, waive any of the procedural requirements herein.

(j) *Schedule of fees.* (1) The Commission may charge the following fees for the production of information pursuant to the Act:

(i) Publications offered for sale—as marked.

(ii) Commission reports—\$0.25/page.

(iii) Committee reports—\$0.25/page.

(iv) Commission Memorandums of Actions—\$0.25/page.

(v) Transcripts of Commission meetings and Committee meetings—\$0.25/page.

(vi) Other records—\$0.25/page.

(vii) Maps—microfilm printout—\$1.00/each; ozalid maps—\$0.30/linear foot.

(viii) Manual record research: \$2.25 per quarter hour if conducted by a clerical employee; \$5.00 per quarter hour if conducted by a professional or managerial employee.

(2) The Commission keeps on file a limited quantity of back copies of Executive Director's Recommendations, Committee Reports, and Commission Memorandums of Actions. The Commission will first attempt to fill specific requests for these documents from its supply of back copies and until the supply is exhausted, the Commission will provide the documents at no charge. Once the supply is exhausted, the requested documents will be provided in accord with the fee schedule.

(3) The minimum fee for the production of information will be \$2.00. The Commission's Records Management Officer may waive fees when less than \$2.00 or when it is in the public interest to do so. Such a waiver will be in the public interest, for example, when in the determination of the Commission the request will not impose an undue burden or expense upon it and the request is: (i) From another Government organization, Federal, State or local; (ii) for the purpose of obtaining information primarily for the benefit of the general public rather than for the primary benefit of the requester, as will be the case with certain requests from news media and from organizations engaged in a nonprofit activity designed for public safety, health, welfare, or education; (iii) from employees and former employees seeking information from their own personnel records; (iv) from or on behalf of the defending party in connection with a proceeding against such party by the Federal Government; and (v) from a low-income person and the fee would impose a financial hardship.

(k) *Prior approval or advance deposit of fees.* (1) Where the fees anticipated to result from a request are substantially greater than the amount estimated in the written request, the persons requesting the information shall be immediately notified of the estimated fees and his approval of such fees requested. Such person shall also be afforded the opportunity to revise his or her request to reduce the fees but satisfy his or her needs for information.

(2) The Commission's Records Management Officer may require that the person requesting information make

an advance deposit of the estimated fees.

(3) The dispatch of any such request for an estimated fee approval or advance deposit shall suspend, until a reply is received by the Commission's Records Management Officer, the period pursuant to 5 U.S.C., 552 and paragraph (f) *supra* within which the Records Management Officer must respond to a written request for information.

(l) *Payment of fees.* Fees charged a person for the production of information must be paid in full prior to release of the information. In the event that the person is in arrears for previous requests to the Commission for information, no information will be provided for any subsequent requests until the arrears have been paid in full. Payment of fees shall be made by a personal check, postal money order or bank draft on a bank in the United States, made payable to the order of the Treasurer of the United States.

PART 460—FEDERAL HOME LOAN MORTGAGE CORPORATION (GOVERNMENT IN THE SUNSHINE ACT REGULATIONS)

Sec.

460.1 Introduction to part.

460.1-1 Purpose and scope.

460.1-2 Definitions.

460.1-3 Open meetings.

460.1-4 Exemptions.

460.1-5 Closed meetings.

460.1-6 Public announcements of meetings.

460.1-7 Accommodation for public attendance at open meetings.

AUTHORITY: 12 U.S.C. 1452(b)(3) (1970).

SOURCE: 42 FR 14857, Mar. 17, 1977, unless otherwise noted.

§ 460.1 Introduction to part.

The Federal Home Loan Mortgage Corporation is a corporate instrumentality of the United States created by the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1451-1459). To the extent required by applicable law, and to the extent appropriate under section 303(b) of the FHLMA Act, the Corporation may publish documents in the **FEDERAL REGISTER**. The materials in this part are presented in codi-

fied form for the sake of increasing their ready accessibility to the public.

§ 460.1-1 Purpose and scope.

This part is issued by the Federal Home Loan Mortgage Corporation ("The Corporation") consistently with the requirements of the Government in the Sunshine Act, section 552b of Title 5, United States Code.

§ 460.1-2 Definitions.

(a) For purposes of this part, the term "meeting" means any deliberations (including those conducted by conference telephone call) of two or more members of the Corporation's Board of Directors ("Directors"), the purpose or effect of which is to determine or result in joint conduct of official business of the Corporation.

§ 460.1-3 Open meetings.

Except as provided in § 460.1-4 of this part, every portion of every meeting of the Directors shall be open to public observation. Directors shall not jointly conduct or dispose of Corporation business other than in accordance with this part.

§ 460.1-4 Exemptions.

(a) The Directors may close a meeting or portion of a meeting, and withhold information pertaining to such meeting, where they determine that disclosure of information pertaining to such meeting or portion thereof is likely to:

(1) Disclose matters that are: (i) Specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such Executive order;

(2) Relate solely to the internal personnel rules and practices of the Corporation;

(3) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552), provided that such statute: (i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Disclose trade secrets or commercial or financial information obtained from a person and privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would: (i) Interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source or, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Corporation or an agency responsible for the regulation or supervision of financial institutions;

(9) Disclose information the premature disclosure of which would: (i) Be likely to (A) lead to significant financial speculation in currencies, securities, or commodities, or (B) significantly endanger the stability of any financial institution; or (ii) be likely to significantly frustrate implementation of a proposed Corporation action, except that subparagraph (iii) shall not apply in any instance where the Corporation has already disclosed to the public the content or nature of its proposed action, or where the Corporation is required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

(10) Specifically concern the Corporation's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition of a particular case involving a determination on the record after opportunity for a hearing.

(b) A meeting or portions of a meeting shall not be closed nor information withheld pursuant to paragraph (a) of this section if the Directors find that the public interest requires that the meeting or portion or portions of a meeting be open to public observation or that such information should not be withheld.

§ 460.1-5 Closed meetings.

(a) *Meetings closed under expedited procedures.* (1) Since the Corporation qualifies for the use of expedited closing procedures under subsection 552b(d)(4) of the Act, meetings or portions thereof exempt under paragraphs (4), (8), (9)(ii), or (10) of subsection (c) of the Act (paragraphs (a)(4), (8), (9)(ii), or (10) of § 460.1-4) may be closed to public observation and information pertaining to such meeting or portions thereof may be withheld from public disclosure, under the expediting procedures of this paragraph, unless the Corporation determines that the public interest requires an open meeting.

(2) Where a meeting or portion thereof is to be closed under this paragraph (a), a public record shall be kept of the Directors' vote at the beginning of the meeting to close it or a portion thereof and any certification by the General Counsel (or in his absence or incapacity the senior legal officer of the Corporation available) that such closure is authorized by law, including a statement pertaining to the relevant exemptive provision or provisions of law. Such record shall be made available to the public at or through the Office of the Secretary of the Corporation.

(3) Public announcement of the time, place, and subject matter of meetings or portions thereof closed under this section (a) shall be made at the earliest practicable time.

(b) *Meetings closed under regular procedures.* (1) A meeting or portion

thereof will be closed to public observation under regular procedures, or information pertaining to such meeting or portion of a meeting will be withheld, only by recorded vote of a majority of the Directors when it is determined that such meeting or portion or the withholding of such information qualifies for exemption under § 460.1-4(a)(1), (2), (3), (5), (6), (7) or (9)(ii) of this part. Votes by proxy are not allowed.

(2) Except as provided in paragraph (b)(3) of this section, a separate vote of the Directors will be taken with respect to the closing or the withholding of information as to each meeting or portion thereof which is proposed to be closed to public observation or with respect to which information is proposed to be withheld pursuant to this paragraph (b).

(3) A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to public observation or with respect to any information concerning such series of meetings proposed to be withheld, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series.

(4) Whenever any person's interests may be directly affected by a portion of a meeting for any of the reasons referred to in § 460.1-4(a)(5), (6) or (7) of this part, such person may send a written request to the Secretary of the Corporation asking that such portion of the meeting be closed to public observation. The Secretary, or in his absence the Acting Secretary of the Corporation, will transmit the request to the Directors and upon the request of any one of them a recorded vote will be taken whether to close such meeting to public observation.

(5) Within one day of any vote taken pursuant to this paragraph (b), the Corporation will make publicly available at or through the Office of the Secretary a written copy of such vote reflecting the vote of each Director on the question. If a meeting or a portion of a meeting is to be closed to public observation, the Corporation, within one day of the vote taken pursuant to

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this paragraph (b), will make publicly available at or through the Office of the Secretary a full, written explanation of its action closing the meeting or portion of the meeting together with a list of all persons expected to attend the meeting and their affiliation, except to the extent such information is determined by the Corporation to be exempt from disclosure under § 460.1-4(a) of this part.

(c) *Recordkeeping.* (1) A complete transcript or recording shall be made and maintained of the proceedings at each meeting or portion thereof closed to the public under this part, except that, where appropriate, minutes may be made and maintained in lieu of such transcript or recording with respect to meetings closed or information withheld under § 460.1-4(a)(8), (9)(i) or (10) of this part. Such minutes shall fully and clearly describe all matters discussed and provide a full and accurate summary of any action taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each Director on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) Such transcript, electronic recording, or minutes of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, shall be made promptly available to the public at or through the Office of the Secretary, except for such item or items of such discussion or testimony as the Corporation determines to contain information which may be withheld under § 460.1-4(a) of this part. Copies of such transcript or minutes or a transcription of such recording, disclosing the identity of each speaker, shall be furnished to any persons at the actual cost of duplication or transcription. The Corporation shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Corporation proceeding with re-

spect to which the meeting or portion thereof was held, whichever occurs later.

§ 460.1-6 Public announcements of meetings.

(a) Except as otherwise provided in this section, public announcement of open meetings and meetings or portions thereof closed under § 460.1-5(b) of this part will be made at least one week in advance of each meeting. Except to the extent that such information is determined to be exempt from disclosure under § 460.1-4(a) of this part, each such public announcement will state the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and telephone number of the official designated to respond to requests for information about the meeting. Each such announcement shall be posted in the main lobby of the Corporation's headquarters, and may be made available by other means or at other locations as may be deemed desirable by the Corporation. Immediately following each public announcement, the stated information shall also be submitted for publication in the *FEDERAL REGISTER*.

(b) Where a majority of the Directors determine by recorded vote that Corporation business requires that a meeting be called at any earlier date, the one-week prior-announcement rule shall be suspended and announcement shall be made at the earliest practicable time.

(c) Change of the time or place of a meeting following public announcement may be made only if announced at the earliest practicable time.

(d) Change of the subject matter of a meeting or redetermination to open or close a meeting or portions thereof may be made after public announcement only if a majority of the Directors determines by recorded vote that Corporation business so requires and no earlier announcement of the change was possible, and public announcement of such change and the vote of each member upon such change is made at the earliest practicable time.

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§ 460.1-7 Accommodation for public attendance at open meetings.

Unless otherwise specified, open meetings are held in Room 630 at 320 First Street, N.W., Washington, D.C. 20552, at the time and on the date specified in the advance public notice; such information is posted in the main lobby at such location. Interested members of the public may attend such meetings but may not participate therein unless invited or permitted to do so by the Corporation.

PART 461—FEDERAL HOME LOAN MORTGAGE CORPORATION (PRIVACY ACT REGULATIONS)

Sec.

- 461.1 Introduction to part.
- 461.2 Purpose and scope.
- 461.3 Definitions.
- 461.4 Records on individuals in a System of Records: Procedures for requesting information about such records and access thereto.
- 461.5 Procedures for identifying the individual making the request.
- 461.6 Disclosure of requested information to individuals.
- 461.7 Request for amendment to record.
- 461.8 Corporation review of request for correction or amendment of record.
- 461.9 Appeals of denial of request for correction or amendment of record.
- 461.10 Fees for providing copies of records.
- 461.11 Criminal penalties.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 42 FR 64631, Dec. 27, 1977, unless otherwise noted.

§ 461.1 Introduction to part.

The Federal Home Loan Mortgage Corporation is a corporate instrumentality of the United States created by the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1451-1459). To the extent required by applicable law, and to the extent appropriate under section 303(b) of the FHLMC Act, the Corporation may publish documents in the FEDERAL REGISTER. The materials in this Part are presented in a form which will be codified for the sake of increasing their accessibility to the public.

§ 461.2 Purpose and scope.

(a) This part is issued by the Federal Home Loan Mortgage Corporation

consistent with the requirements of the Privacy Act of 1974, section 552a of Title 5, United States Code, and establishes methods and procedures by which the Corporation implements that Act.

(b) The records covered by this part shall include all records contained in record systems maintained by the Corporation.

§ 461.3 Definitions.

The following definitions apply throughout this Part 461. The use of a word or term in the singular shall include the plural, and the use of the male gender shall include the female gender.

(a) The term "agency" has the meaning given to that term in 5 U.S.C. 551(1), and includes any executive department, military department, Government Corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency.

(b) The term "Act" means the "Privacy Act of 1974," Pub. L. 93-579, 5 U.S.C. 552a.

(c) The term "Corporation" means the Federal Home Loan Mortgage Corporation.

(d) The term "individual" means a living person who is a citizen of the United States or an alien lawfully admitted for permanent residence. The parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(e) The term "legal public holiday" means New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day appointed as a national holiday by the President or the Congress of the United States.

(f) The term "maintain" includes maintain, collect, use or disseminate.

(g) The term "records" means any item, collection, or grouping of information about an individual that is

maintained by the Corporation in a system of records, or, if appropriate, another agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

(h) The term "system of records" means a group of any records under the control of the Corporation or, if appropriate, another agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individuals.

§ 461.4 Records on individuals in a System of Records: Procedures for requesting information about such records and access thereto.

(a) Any individual may request information regarding whether a system of records maintained by the Corporation contains any information pertaining to him, and may request access to his record or to any information pertaining to him that is contained in a system of records. All such requests shall be directed to the Director of Personnel, Federal Home Loan Mortgage Corporation, 311 First Street, N.W., Washington, D.C. 20001. The consideration by the Corporation of requests submitted by mail will be facilitated if the envelope in which the request is mailed has the words "PRIVACY ACT REQUEST" in capital letters on the front of it.

(b) A request for information about a record or for access to a record or to information pertaining to any individual that is contained in a system of records may be made by mail only.

(c)(1) Such a request shall be in writing and signed by the individual making the request and include: (i) The full name (including the middle name) of the individual seeking the information or records, his home address and telephone number, his business address and telephone number and (ii) a certified or authenticated copy of documents establishing par-

entage or legal guardianship, if appropriate.

(2) In addition, such a request should: (i) Specify the title of the system or records, which appears in the notice of systems published in the FEDERAL REGISTER by the Corporation, and (ii) describe the information sought or the time, place, or form of access, as appropriate.

(d) Any request not addressed and marked as specified in paragraph (a) of this section shall be forwarded immediately to the Director of Personnel. A request that is improperly addressed by an individual shall not have been "received" for purposes of measuring time periods in this section until actual receipt by the Director of Personnel. In each instance when a request so forwarded is received by the Director of Personnel, the individual making the request shall be notified that the request was improperly addressed and the date when the request was received by the Director of Personnel.

(e) When access to a record or information pertaining to the individual that is contained in a system of records is requested, the individual either will be notified in writing where and when he may obtain access to the records requested or, if further arrangements are required, will be given the name, address and telephone number of the person at the Corporation responsible for such arrangements.

(f) Assistance in preparing a request for information about a record or for access to a record or to information pertaining to the individual that is contained in a system of records may be obtained from the Director of Corporate Relations, Federal Home Loan Mortgage Corporation, 311 First Street, N.W., Washington, D.C. 20001.

§ 461.5 Procedures for identifying the individual making the request.

(a) When a request for information about or for access to a record or to information pertaining to an individual that is contained in a system of records has been made pursuant to § 461.4, the Corporation shall require reasonable identification of the indi-

vidual making the request before information will be given or access will be granted, to insure that information is given or records are disclosed only to the proper person.

(b) Subject to paragraphs (c) and (d) of this section, an individual making a request may establish his identity by including with his request a photograph of two identifying documents bearing his name and signature, one of which shall bear his current home or business address.

(c) If the Director of Personnel or other designated Corporation official determines that the information in the record is so sensitive that unauthorized access could cause harm or embarrassment to the individual whose record is involved, or if the individual making the request is unable to produce satisfactory evidence of identity under paragraph (b) of this section, the individual making the request may be required to submit such other proof of identity as the Director of Personnel deems satisfactory. Required proof of identity may include, but is not limited to, personal identification cards, employee identification cards, driver's license, Social Security number, knowledge of birthdate and relative's names, and signature comparisons. In order to request additional proof of identity under this subsection, the Director of Personnel must notify the individual that the proof provided pursuant to paragraph (b) of this section is inadequate not later than ten days (excluding Saturday, Sundays, and legal public holidays) after receipt of the individual's request.

§ 461.6 Disclosure of requested information to individuals.

(a) Each request for information about or for access to a record or to information pertaining to any individual that is contained in a system of records shall be acted upon promptly. Every effort will be made to respond within ten days (excluding Saturdays, Sundays, and legal public holidays) of the date of receipt of the request or receipt of satisfactory additional proof of identity. If a response cannot be made within ten days, the Corporation shall send an acknowledgment during

that period providing information on the status of the request.

(b) Any individual who has requested access to a record or to information pertaining to him that is contained in a system of records, in the manner prescribed in § 461.4, and has identified himself as prescribed in § 461.5, shall be permitted to review the record or information and have a copy made of all or any portion thereof in a form comprehensible to him upon payment of the fee, if applicable, or copying services set forth in § 461.10, unless such information or access is denied on the grounds stated in paragraph (e) of this section. Upon the request of an individual, a person of the individual's own choosing may accompany him to review the record at the Corporation, but the individual shall first furnish to the Director of Personnel a written statement authorizing discussion of that individual's record in the accompanying person's presence.

(c) Where record of a document containing information about an individual also contains information not pertaining to him, the portion not pertaining to the individual shall not be disclosed, except to the extent the information is available to any person under the Freedom of Information Act.

(d) *Grant of access*—(1) *Notification*. An individual shall be provided information about or granted access to a record or information pertaining to him that is contained in the system of records, unless the request has been denied in accordance with paragraph (e) of this section. The Director of Personnel shall notify the individual of such determination and provide the following information:

(i) Whether there is a record or information pertaining to him that is contained in a system of records;

(ii) The methods of access, as set forth in paragraph (d)(2) of this section;

(iii) The place at which the record or information may be inspected;

(iv) The earliest date on which the record or information may be inspected and the period of time that the record or information will remain available for inspection. In no event shall the "earliest date" be later than

thirty days (excluding Saturdays, Sundays and legal public holidays) from the date of notification;

(v) The estimated date by which a copy of the record could be mailed and the estimate of fees that would be charged to provide other than the first copy of the record, pursuant to § 461.10. In no event shall the "estimated date" be later than thirty days (excluding Saturdays, Sundays and legal public holidays) from the date of notification;

(vi) The fact that the individual, if he wishes, may be accompanied by another person during the in-person review of the record or information subject to the procedures set forth in paragraph (b) of this section; and,

(vii) Any additional requirements that must be satisfied in order to provide information about or to grant access to the requested record or information.

(2) *Methods of Access.* The following method of access to records or information pertaining to an individual that is contained in a system of records may be available to that individual depending on the circumstances of a particular request:

(i) Inspection in person may be had in the office by the Corporation during the regular business hours; and

(ii) The requested number of copies may be mailed at the request of the individual, subject to payment of the fees prescribed in § 461.10.

(e) *Initial denial of access—(1) Grounds.* A request by an individual for information about or access to a record or information pertaining to that individual that is contained in a system of records may be denied only upon a determination by the Director of Personnel that:

(i) The record is information compiled in reasonable anticipation of a civil action or proceeding; or

(ii) The individual unreasonably has failed to comply with the procedural requirements of this part.

(2) *Notification.* The Director of Personnel shall give written notice of the denial of a request for information about or access to records or information pertaining to the individual that is contained in a system of records,

which notice shall include the following information:

(i) The Director of Personnel's title or position;

(ii) The date of the denial;

(iii) The reasons for the denial, including a citation to the appropriate section of the Act and this part; and

(iv) The individual's right to judicial review under 5 U.S.C. 552a(g)(1)(B), as limited by 5 U.S.C. 552a(g)(5).

§ 461.7 Request for amendment to record.

(a) If, after disclosure of the requested information, an individual believes that such record is not accurate, relevant, timely or complete, he may request in writing that the record be amended. Such a request shall be submitted by mail to the Director of Personnel, Federal Home Loan Mortgage Corporation, 311 First Street, N.W., Washington, D.C. 20011. Each request shall contain identification of the record system and the record or information therein, a brief description of the material requested to be changed, the requested change or changes, the reason for such change or changes, and any documentary evidence supporting the change.

(b) The Director of Personnel shall acknowledge receipt of a request for amendment within ten days (excluding Saturdays, Sundays, and legal public holidays). Such acknowledgment may contain a request for any additional information needed to make a determination.

(c) Any amendment request not addressed and mailed as specified in paragraph (a) of this section shall be forwarded immediately to the Director of Personnel. A request that is improperly addressed by an individual shall not have been "received" for purposes of measuring time periods in this section until actual receipt by the Director of Personnel. In each instance when a request so forwarded is received by the Director of Personnel, the individual making the request shall be notified that the request was improperly addressed and the date when the request was received by the Director of Personnel.

(d) Assistance in preparing a request to correct or amend a record may be

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obtained from the Director of Corporate Relations, Federal Home Loan Mortgage Corporation, 311 First Street, N.W., Washington, D.C. 20001.

§ 461.8 Corporation review of request for correction or amendment of record.

(a) Within thirty days after acknowledging receipt of a request for amendment (excluding Saturdays, Sundays, and legal public holidays), or after receiving such further information as may have been requested by the Corporation, the Director of Personnel shall either:

(1) Make the requested correction or amendment and advise the individual in writing of such action, providing either a copy of the corrected or amended record, or a statement as to the means whereby the correction or amendment was accomplished in cases where a copy cannot be provided (for example, erasure of information from a record maintained only in an electronic data bank); or,

(2) Inform the individual in writing that his request is denied and provide the following information:

(i) The Director of Personnel's name and title and position;

(ii) The date of the denial;

(iii) The reasons for the denial, including a citation to the appropriate sections of the Act and this part; and

(iv) The procedures for appeal of the denial of a request for correction or amendment as set forth in § 461.9, including the name and address of the Corporation Office or official with the responsibility for considering appeals.

(3) If the Director of Personnel cannot make the determination within thirty days, the individual will be advised in writing of the reason therefor and of the estimated date by which the determination will be made.

(b) Whenever an individual's record is corrected or amended pursuant to a request by that individual, the Director of Personnel shall notify all persons and agencies to which the corrected or amended portion of the record had been disclosed prior to its correction or amendment, if an accounting of such disclosure required by the Act was made. The notification shall require a recipient agency maintaining the record to acknowledge re-

ceipt of the notification, to correct or amend the record and to apprise any agency or person to which it had disclosed the record of the substance of the correction or amendment.

§ 461.9 Appeals of denial of request for correction or amendment of record.

(a)(1) Any individual may appeal, to the Chairman of the Corporation's Board of Directors, the denial of a request made by him for correction or amendment of a record issued pursuant to § 461.7. The Chairman has delegated this function to the Corporation's Vice President—General Counsel, and a decision by the Vice President—General Counsel is a final decision by the Corporation.

(2) An appeal shall be filed within thirty days (excluding Saturdays, Sundays, and legal public holidays) after the service of the denial.

(b)(1) The appeal shall be in writing and shall be filed with the Vice President—General Counsel, Federal Home Loan Mortgage Corporation, 311 First Street N.W., Washington, D.C. 20001.

(2) An appeal not addressed and marked as specified in paragraph (b)(1) of this section shall be forwarded immediately to the Vice President—General Counsel. An appeal that is not properly addressed by an individual shall not have been "received" for purposes of measuring the time periods in this section until actual receipt of the appeal by the Vice President—General Counsel. In each instance when an appeal so forwarded is received, the individual filing the appeal shall be notified that the appeal was improperly addressed and the date when the appeal was received by the Vice President—General Counsel.

(c) *Content of appeal.* (1) The appeal shall include the following:

(i) A copy of the original request for correction or amendment;

(ii) A statement of the reasons why the initial denial is believed to be in error.

(2) The record requested to be corrected or amended will be supplied to the Vice President—General Counsel. While such record normally will comprise the entire record on appeal, the Vice President—General Counsel may

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seek such additional information as is necessary to assure that the final determination is fair and equitable and, in such instances, the additional information will be disclosed to the individual making the appeal and, consistent with the time periods provided in paragraph (e) of this section, an opportunity will be provided for comment thereon.

(d) No personal appearance or hearing on appeal will be allowed.

(e) The Vice President—General Counsel shall act upon the appeal and issue a final determination in writing no later than thirty days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the appeal is received, unless the Vice President—General Counsel extends the period for good cause.

(f) If the appeal is granted, that determination shall include the specific corrections or amendments to be made and a copy thereof shall be transmitted promptly both to the individual and to the person who issued the initial denial. Upon receipt of that determination, such person shall take the actions set forth in § 461.8(b).

(g) If the appeal is denied, the final determination shall be transmitted promptly to the individual and shall state the reasons for the denial. The notice of that determination also shall be transmitted promptly to the individual and shall state the reasons for the denial. The notice of that determination also shall include the following information:

(1) The right of the individual to file with the Vice President—General Counsel a concise signed statement of reasons for disagreeing with the final determination, receipt of which statement shall be acknowledged by the Vice President—General Counsel;

(2) The fact that any such disagreement statement filed by the individual shall be noted in the disputed record and that a copy of the statement shall be provided by the Director of Personnel to persons and agencies to which the record is disclosed subsequent to the date of receipt of such statement;

(3) The right of the individual to judicial review of the final determination under 5 U.S.C. 552a(g)(1)(A), as limited by 5 U.S.C. 552a(g)(5).

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§ 461.10 Fees for providing copies of records.

(a) No fee will be charged to an individual for processing the request for, searching for, or providing the first copy of, a record or any portion thereof contained in a record system if the record pertains to such individual.

(b) If an individual should desire multiple copies of a record pertaining to himself, he shall pay a fee of 10 cents per page for each page requested to be reproduced by the Corporation.

§ 461.11 Criminal penalties.

(a) The criminal penalties applicable to employees, officers, and agents of the Corporation for actions which violate the Privacy Act of 1974 are set forth in 5 U.S.C. 552a(i).

(b) A person who falsely or fraudulently attempts to obtain records under the Act also may be subject to prosecution under such other criminal statutes as 18 U.S.C. 494, 495, and 1001.

PART 462—FEDERAL HOME LOAN MORTGAGE CORPORATION (BOOK-ENTRY REGULATIONS)

Sec.

462.1 Definition of terms.

462.2 Authority of Reserve banks.

462.3 Scope and effect of book-entry procedure.

462.4 Transfer or pledge.

462.5 Withdrawal of Federal Home Loan Mortgage Corporation securities.

462.6 Delivery of Federal Home Loan Mortgage Corporation securities.

462.7 Registered bonds and notes.

462.8 Servicing book-entry Federal Home Loan Mortgage Corporation securities; payment of interest; payment at maturity or upon call.

AUTHORITY: 12 U.S.C. 1445(a).

SOURCE: 43 FR 52457, Nov. 13, 1978, unless otherwise noted.

§ 462.1 Definition of terms.

In these regulations, unless the context otherwise requires or indicates:

(a) "Reserve bank" means the Federal Reserve Bank of New York (and any other Federal Reserve bank which agrees to issue Federal Home Loan Mortgage Corporation securities in book-entry form) acting as fiscal agent

of the Federal Home Loan Mortgage Corporation and when indicated acting in its individual capacity or as fiscal agent of the United States.

(b) "Federal Home Loan Mortgage Corporation security" means a bond, note, mortgage, obligation or other security of or sold by the Federal Home Loan Mortgage Corporation issued at a Reserve bank by the Federal Home Loan Mortgage Corporation under title III of the Emergency Home Finance Act of 1970, as amended, in the form of a definitive Federal Home Loan Mortgage Corporation security or a book-entry Federal Home Loan Mortgage Corporation security.

(c) "Book-entry Federal Home Loan Mortgage Corporation security" means a Federal Home Loan Mortgage Corporation security in the form of an entry made as prescribed in this part on the records of a Reserve bank.

(d) [Reserved]

(e) "Pledge" includes a pledge of, or any other security interest in, Federal Home Loan Mortgage Corporation securities as collateral for loans or advances or to secure deposits of public moneys or the performance of an obligation.

(f) "Date of call" is the date fixed in the authorizing resolution of the Board of Directors of the Federal Home Loan Mortgage Corporation on which the Federal Home Loan Mortgage Corporation will make payment of the security before maturity in accordance with its terms.

(g) "Member bank" means any national bank, State bank, or bank or trust company which is a member of a Reserve bank.

§ 462.2 Authority of Reserve banks.

Each Reserve bank is hereby authorized, in accordance with the provisions of these rules, to: (a) Issue book-entry Federal Home Loan Mortgage Corporation securities by means of entries on its records which shall include the name of the depositor, the amount, the series, and maturity date; (b) effect conversions between book-entry Federal Home Loan Mortgage Corporation securities and definitive Federal Home Loan Mortgage Corporation securities with respect to those securities as to which conversion rights are

available pursuant to the applicable securities offering materials; (c) otherwise service and maintain book-entry Federal Home Loan Mortgage Corporation securities; and (d) issue confirmations of transactions in the form of written advices (serially numbered or otherwise) which specify the amount and description of any securities (that it, series and maturity date) sold or transferred and the date of the transaction.

§ 462.3 Scope and effect of book-entry procedure.

(a) A Reserve bank as fiscal agent of the Federal Home Loan Mortgage Corporation may apply the book-entry procedure provided for herein to any Federal Home Loan Mortgage Corporation securities which have been or are hereafter deposited for any purpose in accounts with it in its individual capacity under terms and conditions which indicate that the Reserve bank will continue to maintain such deposit accounts in its individual capacity, notwithstanding application of the book-entry procedure to such securities. This paragraph is applicable, but not limited, to Federal Home Loan Mortgage Corporation securities deposited:

(1) As collateral pledged to a Reserve bank (in its individual capacity) for advances by it;

(2) By a member bank for its sole account;

(3) By a member bank held for the account of its customers;

(4) In connection with deposits in a member bank of funds of States, municipalities, or other political subdivisions; or,

(5) In connection with the performance of an obligation or duty under Federal, State, municipal, or local law, or judgments of decrees of courts.

The application of the book-entry procedure under this paragraph shall not derogate from or adversely affect the relationships that would otherwise exist between a Reserve bank in its individual capacity and its depositors concerning any deposit under this paragraph. Whenever the book-entry procedure is applied to such Federal Home Loan Mortgage Corporation se-

curities, the Reserve bank is authorized to take all action necessary in respect of the book-entry procedure to enable such Reserve bank in its individual capacity to perform its obligations as depository with respect to such Federal Home Loan Mortgage Corporation securities.

(b) A Reserve bank as fiscal agent of the Federal Home Loan Mortgage Corporation may apply the book-entry procedure to Federal Home Loan Mortgage Corporation securities deposited as collateral pledged to the United States under Treasury Department Circular Nos. 92 and 176, both as revised and amended, and may apply the book-entry procedure, with the approval of the Secretary of the Treasury, to any other Federal Home Loan Mortgage Corporation securities deposited with a Reserve bank as fiscal agent of the United States.

(c) Any person having an interest in Federal Home Loan Mortgage Corporation securities which are deposited with a Reserve bank (in either its individual capacity or as fiscal agent of the United States) for any purpose shall be deemed to have consented to their conversion to book-entry Federal Home Loan Mortgage Corporation securities pursuant to the provisions of these rules, and in the manner and under the procedures prescribed by the Reserve bank.

(d) No deposits shall be accepted under this section on or after the date of maturity or call of the Federal Home Loan Mortgage Corporation securities.

§ 462.4 Transfer of pledge.

(a) A transfer or pledge of book-entry Federal Home Loan Mortgage Corporation securities to a Reserve bank (in its individual capacity or as fiscal agent of the United States), or to the United States, or to any transferee or pledgee eligible to maintain an appropriate book-entry account in its name with a Reserve bank under these rules is effected and perfected, notwithstanding any provisions of law to the contrary, by a Reserve bank making an appropriate entry in its records of the securities transferred or pledged. The making of such an entry in the records of a Reserve bank shall:

(1) Have the effect of a delivery in bearer form of definitive Federal Home Loan Mortgage Corporation securities; (2) have the effect of taking of delivery by the transferee or pledgee; (3) constitute the transferee or pledgee a holder; and (4) if a pledge, effect a perfected security interest therein in favor of the pledgee. A transfer or pledge of book-entry Federal Home Loan Mortgage Corporation securities effected under this paragraph shall have priority over any transfer, pledge, or other interest, theretofore or thereafter effected or perfected under paragraph (b) of this section or in any other manner.

(b) A transfer or a pledge of transferable Federal Home Loan Mortgage Corporation securities, or any interest therein, which is maintained by a Reserve bank (in its individual capacity or as fiscal agent of the United States) in a book-entry account under these rules including securities in book-entry form under § 462.3(a)(3), is effected, and a pledge is perfected, by any means that would be effective under applicable law to effect a transfer or to effect and perfect a pledge of the Federal Home Loan Mortgage Corporation securities, or any interest therein, if the securities were maintained by the Reserve bank in bearer definitive form. For purposes of transfer or pledge hereunder, book-entry Federal Home Loan Mortgage Corporation securities maintained by a Federal Reserve bank shall, notwithstanding any provision of law to the contrary, be deemed to be in maintained in bearer definitive form. A Reserve bank maintaining book-entry Federal Home Loan Mortgage Corporation securities either in its individual capacity or as fiscal agent of the United States is not a bailee for purposes of notification of pledges of those securities under this paragraph, or a third person in possession for purposes of acknowledgment of transfers thereof under this paragraph. Where transferable Federal Home Loan Mortgage Corporation securities are recorded on the books of a depository (a bank, banking institution, financial firm or similar party, which regularly accepts in the course of its business Federal Home Loan Mortgage Corporation securities as a

custodial service for customers, and maintains accounts in the names of such customers reflecting ownership of or interest in such securities) for account of the pledgor or transferor thereof and such securities are on deposit with a Reserve bank in a book-entry account hereunder, such depositary shall, for purposes of perfecting a pledge of such securities to a purchaser under applicable provisions of law, be the bailee to which notification of the pledge of the securities may be given or the third person in possession from which acknowledgment of the holding of the securities for the purchaser may be obtained. A Reserve bank will not accept notice or advice of a transfer or pledge effected or perfected under this paragraph, and any such notice or advice shall have no effect. A Reserve bank may continue to deal with its depositors in accordance with the provisions of these rules, notwithstanding any transfer or pledge effected or perfected under this paragraph.

(c) No filing or recording with a public recording office or officer shall be necessary or effective with respect to any transfer or pledge of book-entry Federal Home Loan Mortgage Corporation securities or any interest therein.

(d) A Reserve bank shall, as to book-entry securities having conversion rights and upon receipt of appropriate instructions, convert book-entry Federal Home Loan Mortgage Corporation securities into definitive Federal Home Loan Mortgage Corporation securities and deliver them in accordance with such instructions; no such conversion shall affect existing interests in such Federal Home Loan Mortgage Corporation securities.

(e) A transfer of book-entry Federal Home Loan Mortgage Corporation securities within a Reserve bank shall be made in accordance with procedures established by the bank not inconsistent with these rules. The transfer of book-entry Federal Home Loan Mortgage Corporation securities by a Reserve bank may be made through a telegraphic transfer procedure.

(f) All requests for transfer or withdrawal must be made prior to the maturity or date of call of the securities.

§ 462.5 Withdrawal of Federal Home Loan Mortgage Corporation securities.

(a) A depositor of book-entry Federal Home Loan Mortgage Corporation securities may withdraw them from a Reserve bank by requesting delivery of like definitive Federal Home Loan Mortgage Corporation securities to itself or on its order to a transferee, provided that such securities provide for a right of conversion to definitive form pursuant to the offering materials applicable to such securities.

(b) Federal Home Loan Mortgage Corporation securities of a series which was originally issued in bearer form only and which are actually to be delivered upon withdrawal may be issued in bearer form only, until the date of the first issue of such securities in registered form; Federal Home Loan Mortgage Corporation securities of a series which was originally issued in registered form only and which are actually to be delivered upon withdrawal may be issued in registered form only, until the date of first issue of such securities in bearer form. After the date of first issue in registered form of a series of Federal Home Loan Mortgage Corporation securities originally issued in bearer form only or the date of first issue in bearer form of a series of Federal Home Loan Mortgage Corporation securities originally issued in registered form only, all securities of such series which are actually to be delivered upon withdrawal may be issued either in bearer or registered form. All Federal Home Loan Mortgage Corporation securities of a series which were originally issued in both registered and bearer form and which are actually to be delivered upon withdrawal may be issued either in bearer or registered form.

§ 462.6 Delivery of Federal Home Loan Mortgage Corporation securities.

A Reserve bank which has received Federal Home Loan Mortgage Corporation securities and effected pledges, made entries regarding them, or transferred or delivered them according to the instructions of its depositor is not liable for conversion or for participation in breach of fiduciary duty even though the depositor had no right to

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dispose of or take other action in respect of the securities. A Reserve bank shall be fully discharged of its obligations under these rules by the delivery of Federal Home Loan Mortgage Corporation securities in definitive form to its depositor or upon the order of such depositor. Customers of a member bank or other depository (other than a Reserve bank) may obtain Federal Home Loan Mortgage Corporation securities in definitive form only by causing the depositor of the Reserve Bank to order the withdrawal thereof from the Reserve bank.

§ 462.7 Registered bonds and notes.

No formal assignment shall be required for the conversion to book-entry Federal Home Loan Mortgage Corporation securities of registered Federal Home Loan Mortgage Corporation securities held by a Reserve bank (in either its individual capacity or as fiscal agent of the United States) on the effective date of these rules for any purpose specified in § 462.3(a) hereof. Registered Federal Home Loan

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Mortgage Corporation securities deposited thereafter with a Reserve bank for any purpose specified in § 462.3 shall be assigned for conversion to book-entry Federal Home Loan Mortgage Corporation securities. The assignment, which shall be executed in accordance with the provisions of Subpart F of 31 CFR Part 306, so far as applicable, shall be to "Federal Reserve Bank of _____, as fiscal agent of the Federal Home Loan Mortgage Corporation for conversion to book-entry Federal Home Loan Mortgage Corporation securities."

§ 462.8 Servicing book-entry Federal Home Loan Mortgage Corporation securities; payment of interest; payment at maturity or upon call.

Payments of principal and interest on Federal Home Loan Mortgage Corporation securities will be made by a Federal Reserve bank on the interest due dates and dates of maturity or call and remitted or credited in accordance with the depositor's instructions.

Title 2—[Reserved]

Title 2—(Reserved)

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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The following list of CFR sections affected indicates changes made by documents published in the FEDERAL REGISTER. Entries indicate the nature of the changes effected. Page numbers refer to FEDERAL REGISTER pages.

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